

SR001

To be argued by:
Randall D. Unger
(15 minutes)

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

-----X
THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

A.D. No. 2015-01907

-against-

Ind. No. 2228/2012
Queens County

RAYMOND BALL,

TO BE HEARD ON THE
ORIGINAL RECORD

Defendant-Appellant.
-----X

APPEALS BUREAU
QUEENS COUNTY D.A.

2016 AUG 15 A 10:32

**BRIEF FOR DEFENDANT-APPELLANT
RAYMOND BALL**

RANDALL D. UNGER
Attorney for Defendant-Appellant
Raymond Ball
42-40 Bell Boulevard, Suite 302
Bayside, New York 11361
(718) 279-4500

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

-----X
THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

RAYMOND BALL,

Defendant-Appellant.
-----X

PRELIMINARY STATEMENT

This is an appeal from a judgment rendered March 4, 2015, by the Supreme Court, Queens County, convicting the appellant, after a jury trial, of two counts of robbery in the second degree in violation of Penal Law § 160.10 (1) and Penal Law § 160.10 (2) (a), assault in the third degree in violation of Penal Law § 120.00 (1) and criminal possession of stolen property in the fifth degree in violation of Penal Law § 165.40, and sentencing him to concurrent determinate terms of imprisonment of 10 years for the robbery counts and definite terms of imprisonment of one year for the assault and stolen property count (Barry A. Schwartz, J., at trial and sentencing).

Timely notice of appeal was filed. On January 7, 2016, this Court granted the appellant's motion for poor person's relief, and on April 14, 2016,

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assigned Randall Unger as counsel on appeal. No stay of execution has been sought and the appellant is presently incarcerated pursuant to the judgment of conviction entered herein.

QUESTIONS PRESENTED

POINT I

Whether the hearing court erroneously denied the appellant's motion to suppress physical evidence, statements and prior identification evidence.

POINT II

Whether the appellant was denied his due process right to a fair trial when the People elicited third-party testimony from a police officer that he was identified in a showup procedure by the complaining witness.

POINT III

Whether the appellant's decision to proceed to trial *pro se* was made knowingly and voluntarily and whether his waiver of his right to counsel was ineffective, requiring that a new trial be ordered.

POINT IV

Whether the imposition of a 10 year sentence of imprisonment for the appellant's conviction of robbery in the second degree was unduly harsh and excessive and should, in the interest of justice, be reduced.

STATEMENT OF FACTSThe Suppression Hearing

P.O. Daniel Lanning, assigned to the 115th Pct., was in plainclothes on patrol in an unmarked vehicle on the night of July 3, 2012. At about 9:00 p.m., he received a radio call of a male being robbed at knifepoint at the corner of 105th Street and Northern Boulevard by three black males, one of whom was dressed in a white shirt and black pants. When he proceeded to that location, he observed a man named El Turkey who was bleeding from his head and mouth and looked as if he had been beaten up. El Turkey told P.O. Lanning that he'd been robbed and pointed southbound on 105th Street, indicating that the perpetrators had fled in that direction. He did not describe the attack or the perpetrators at that time (HA4-HA7, HA10-HA13, HA17-HA21, HB15-HB16).¹

P.O. Lanning had El Turkey sit in the back seat of his car and then drove southbound on 105th Street. Within seconds, P.O. Lanning observed two men, one of whom was later identified as Elijah Brooks, who was wearing a white shirt, black pants and a baseball cap. El Turkey pointed at Brooks and stated "that's the guy

¹Numerical references preceded by "HA" are to the minutes of the suppression hearing conducted on May 21, 2013. Those preceded by "HB" are to the minutes of the reopened suppression hearing conducted on January 8, 2014. Those with no prefix are to the minutes of the trial. Those preceded by an "S" are to the minutes of the sentencing.

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there". P.O. Lanning then exited his car and stopped both men. However, he only arrested Brooks and then placed a radio call stating that "we had a male stopped" (HA7-HA9, HA12-HA17, HA19, HB16-H23).

P.O. Angelo Pampena, also assigned to the 115th Pct., was in uniform on patrol in an unmarked car when he heard a radio call of a robbery in progress at 105th Street and Northern Boulevard on July 3, 2012 at about 9:00 p.m. The description of the perpetrators in that call was "male Blacks, wearing a white shirt, black pants". However, he could not recall if the call described how many perpetrators there were or the heights, weights or ages of any of the perpetrators. As he drove southbound on 105th Street, he observed a black male, later identified as the appellant, wearing a white T-shirt and black pants and holding an iPhone as he was running northbound on 105th Street. As P.O. Pampena exited his car to stop him, the appellant, who had no injuries or blood on him, stated either that he had purchased or gotten the phone from 105th Street and Northern Boulevard. P.O. Pampena then handcuffed the appellant. When he searched him, he found a hundred dollar bill, seven twenty dollar bills and a ten dollar bill in his pocket (HA22-HA27, HA35-HA43, HA55-HA56, HB30-HB31).

When P.O. Pampena transported the appellant to 105th Street and Northern Boulevard, he observed El Turkey sitting in the back of an ambulance. He

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also observed that El Turkey had blood on his head, face and mouth, a black and blue eye that was swollen shut and clothing that was ripped, disheveled and bloody. As El Turkey was being cleaned by EMS personnel, he identified the iPhone that P.O. Pampera had taken from the appellant and identified the appellant as the perpetrator who took his wallet and phone from his pocket. He also stated that he was robbed of the same denominations of U.S. currency that P.O. Pampera had recovered from the appellant (HA27-HA33, HA44-HA48, HB31-HB39, HB46-HB48).

After the identification was made, El Turkey refused to be taken to a hospital for medical treatment. P.O. Pampera then placed the appellant in the back of his car. When the appellant asked why he was being arrested, P.O. Pampera replied that it was for a robbery. The appellant then stated "that if the guy said it was his then I guess it was his" (HA33-HA34, HA49-H50, HB41-H45).

The Hearing Court Decisions

At the conclusion of the initial suppression hearing, the court denied the motions to suppress, concluding that the police had probable cause to arrest the appellant (HA61-HA64). A decision and order reflecting that decision was issued on May 22, 2013. After the re-opened hearing was concluded, the court issued a decision and order dated January 14, 2014 which adhered to its earlier decision denying the motions to suppress in their entirety.

The TrialThe People's Case

Tarek El Turkey, a cab driver who was born in Egypt, shared a basement apartment with a roommate on 105th Street between Northern Boulevard and 32nd Avenue in the Corona section of Queens. On July 3, 2012, at about 8:30 p.m., he left his apartment to purchase a pack of cigarettes. First, he walked to an ATM machine in a check cashing store at the corner of 106th Street and Northern Boulevard and withdrew \$260.00 in cash. He then walked one block to a deli which he frequented to purchase the cigarettes. Outside the deli was a group of individuals. One of those individuals was a homeless black man whom El Turkey had seen begging in the area three or four times previously and “always [would] give him [a] dollar or coffee or something”. When asked if that man was in the courtroom, El Turkey replied, “He is not here” (336-346, 392-393).

After he purchased a pack of cigarettes in the deli, he left the store, lit a cigarette and phoned someone as he walked along 105th Street towards 34th Avenue. Though he had testified before the grand jury that he became aware that two black men began following him at that time, he insisted that he was followed by one black man whom he described as weighing between 250 and 300 pounds, and wearing a white shirt and dark jeans. As his apprehension grew, El Turkey walked into the

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street to walk in the direction of the deli. After he heard the man who was following him tell someone to punch him, the man pushed him to the ground between two parked cars. He then observed that the homeless man whom he had seen earlier was behind him on the ground. While the heavyset man punched him in the face, the homeless man ripped his pants pocket and removed his cell phone and wallet which contained \$250 in cash. The heavyset man then slammed his head against the curb two or three times, cursed him and threatened to kill him. As a result, El Turkey's eye became swollen, one of his teeth was loosened and he felt pain in his face (347-370, 393-402).

When the attack ended, El Turkey observed the heavyset man proceed up Northern Boulevard towards 34th Street. However, he did not observe where the homeless man went. After about a minute, he stood up and went back inside the deli and told the manager that he'd been mugged and asked him to call the police. While inside the deli, the heavyset man returned to the front of the store and threatened and cursed at him again. He claimed he recognized this man because he was wearing the same clothing that he wore during the attack – a red shirt and black pants (370-372, 402-409).

About 15 seconds later, El Turkey exited the deli and approached two plainclothes police officers in an unmarked car. He rode with those officers for

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approximately 60 to 80 feet when he observed the heavysset man and another taller man in the street. El Turkey identified the heavysset man as the one who had punched him. However, he did not identify that man when asked if he recognized him in the courtroom (373-378, 409-414).

After El Turkey exited the police car, he was treated in an ambulance that had arrived at the scene. When additional police officers arrived, one of them showed El Turkey a Blackberry phone that did not belong to him and an iPhone that he identified as his. A police officer also told him that “he going to bring the guy they find the money with him and from far away, and I can recognize him I say yes or no ... so I tell him, yes, this guy”. The man he identified as the “homeless guy” was someone he knew “very well” and who “[s]ometimes ... acted like a gay” and dressed “like a woman”. When asked if he recognized that man in the courtroom, El Turkey twice replied “No” (378-385, 418-427).

After the paramedics cleaned him up, El Turkey was asked if he wanted to go to a hospital but declined to go because he didn’t want to miss time from work. Instead, he was driven to a police station where an officer gave him his wallet and \$250 in cash (381-384, 427-431).

Det. Daniel Lanning, a field intelligence officer assigned to the 115th Pct., responded to a radio call of a “male being robbed at knifepoint” by three male

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blacks at the corner of 105th Street and Northern Boulevard on July 3, 2012, shortly before 9:00 p.m. When he arrived at that location, he observed Tarek El Turkey, bleeding from his face and mouth, waving at him. After a brief conversation with El Turkey, he placed him in the rear seat of his car and proceeded southbound on 105th Street. Within five seconds, Det. Lanning observed two black males walking northbound in his direction, When El Turkey stated “that’s him”, Det. Lanning exited his car and approached the two men with his gun drawn. El Turkey then identified the taller of the two men, Elijah Brooks, as “the individual that robbed him”. Det. Lanning handcuffed Brooks and placed him under arrest (433-481).

P.O. Angelo Pampena, assigned to the anti-crime unit of the 115th Pct., responded to a radio call describing a knifepoint robbery in progress by three male blacks at 105th Street and Northern Boulevard on July 3, 2012 at about 8:55 p.m. As he approached 32nd Avenue, he observed a male black, later identified as the appellant, wearing a white T-shirt and black jeans, running northbound on 105th Street. He did not observe any blood or dirt on the appellant’s clothing. When he stopped his car, the appellant, who was holding an iPhone, stopped, raised his hands and stated that “he bought a phone at 105 and Northern Boulevard”. The officer then took the iPhone out of his hand, handcuffed and frisked him and found \$250 in cash in his right front pants pocket (497-511, 542-543, 550-552, 559, 568-570).

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The appellant was driven to 105th Street and Northern Boulevard where an ambulance that was recorded as arriving at the scene at 9:11 p.m., was parked at the corner. P.O. Pampera entered the rear of the ambulance and spoke with Tarek El Turkey whose face was bloody and swollen and whose clothes were torn. P.O. Pampera then asked El Turkey if he recognized the appellant who was standing in front of a police car. El Turkey identified the appellant and stated that he “was the one that started to assault him, and then he was the one that took his pocket, he rifled through his pockets and took out the phone and the money”. He also stated that he had seen the appellant on many previous occasions in the vicinity of 105th Street and Northern Boulevard. P.O. Pampera then showed El Turkey the iPhone he had recovered but denied showing him a Blackberry phone. After unlocking the iPhone, he saw photographs of El Turkey and gave the phone to him (511-515, 552-567, 580).

After speaking with El Turkey, P.O. Pampera canvassed the area to see if he could find any other evidence. In the course of that canvas, he found El Turkey’s wallet, which contained a Social Security card and some other identification documents, on a sewer grate at 105th Street and Northern Boulevard (572-574).

As the appellant was being driven to the police station, he asked what he was being charged with. When P.O. Pampera replied, “robbery”, the appellant responded, “well, if he says it’s his, I guess it’s his” (575).

P.O. Pampena later photographed the iPhone and cash he had recovered and vouchered those items. He also took photographs of El Turkey and vouchered those as well (515-525).

The Defense Case

Adi Gonzalez, an emergency medical technician employed by the New York City Fire Department, responded to a call at 9:07 p.m. on July 3, 2012 and proceeded to 106th Street and Northern Boulevard. He arrived at that location at 9:11 p.m. His first contact with Tarek El Turkey, who had pain in his face and swelling and soft tissue injury on his forehead, was at 9:21 p.m. In his report documenting the incident, Gonzalez did not indicate that El Turkey was bleeding. His report did indicate that he attempted to convince El Turkey to seek medical attention but that El Turkey had refused treatment, stating, "In my country we believe in God whatever happens, happens". However, he could not say whether El Turkey was ever inside his ambulance (612-645).

The Verdict & Sentencing

The appellant was found guilty of two counts of robbery in the second degree, assault in the third degree and criminal possession of a weapon in the fourth degree (726). Based on his prior conviction of burglary in the third degree, he was adjudicated a second felony offender (S2-S4). Thereafter, he was sentenced to

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concurrent determinate terms of imprisonment of 10 years for the robbery counts, and concurrent definite terms of imprisonment of one year for the assault and weapon counts (S24).

ARGUMENT

POINT I

THE HEARING COURT ERRONEOUSLY DENIED THE APPELLANT'S MOTION TO SUPPRESS PHYSICAL EVIDENCE, STATEMENTS AND PRIOR IDENTIFICATION EVIDENCE.

At the suppression hearing, the evidence presented by the People established that on the night of July 3, 2012, P.O. Pampera responded to a radio call describing a robbery in progress. In that same call, the only descriptions of the perpetrators were "male Blacks, wearing a white shirt, black pants". Based on that information, P.O. Pampera forcibly stopped, handcuffed and searched the appellant and then transported him to the location where Tarek El Turkey was being treated by emergency medical technicians and where El Turkey identified the appellant as one of the perpetrators. Though the hearing court concluded that the appellant's arrest was supported by probable cause, it is clear that no such predicate existed. Because P.O. Pampera's forcible detention of the appellant was unlawful, his statements to the police, as well as the cell phone and U.S. currency seized from his person should have

been suppressed. And since the showup identification made by El Turkey was the direct product of the police officer's unlawful conduct, the prior identification evidence should have been suppressed as well. A reversal of the appellant's conviction is therefore required.

Section 140.10 (1) (b) of the Criminal Procedure Law provides that a police officer may arrest a person for any crime "when he has reasonable cause to believe that such person has committed such crime, whether in his presence or otherwise." The term "reasonable cause" is synonymous with "probable cause", *People v. Maldonado*, 86, 631, 635 (1995) and is defined in Section 70.10 (2) of the Criminal Procedure Law as follows:

Reasonable cause to believe that a person committed an offense exists when evidence or information which appears reliable discloses facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment and experience that it is reasonably likely that such offense was committed and that such person committed it.

In determining whether probable cause has been established, it is not necessary that all possibility of the suspect's innocence be excluded or that there be absolute certainty that the suspect has committed a crime. *People v. Bigelow*, 66 N.Y.2d 417, 423 (1985). However, the standard does require that it appear "more probable than not that a crime has taken place and that the one arrested is its

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perpetrator, for conduct equally compatible with guilt or innocence will not suffice.”

People v. Carrasquillo, 54 N.Y.2d 248, 254 (1981), citing *People v. De Bour*, 40 N.Y.2d 210, 216 (1976). Thus, a police officer’s hunch or gut reaction that a person has participated in a crime will not suffice. *People v. Delmonico*, 94 A.D.2d 773, 774 (2d Dept. 1983), citing *People v. Sobotker*, 43 N.Y.2d 559, 564 (1978).

Moreover, where the police are acting on a description of a perpetrator which is general and lacking in specificity, this Court has held that such information is insufficient to establish reasonable suspicion, let alone probable cause to arrest. See *People v. Hargroves*, 296 A.D.2d 581, 582 (2d Dept. 2002) (description of “group of male blacks” one of whom was wearing an orange jacket insufficient); *People v. Riddick*, 269 A.D.2d 471 (2d Dept. 2000) (description of four black men, one of whom was wearing a black jacket on a corner insufficient); *People v. Choy*, 173 A.D.2d 883 (2d Dept. 1991) (four young male Orientals dressed in dark clothing insufficient); *People v. Wisdom*, 125 A.D.2d 512, 513 (2d Dept. 1986) (black man dressed in beige insufficient); *People v. Perez*, 125 A.D.2d 419, 420 (2d Dept. 1986) (male Hispanic wearing black thigh-length coat insufficient). And the mere presence of an individual in the vicinity of a crime scene does not establish probable cause. *People v. Sanchez*, 276 A.D.2d 723, 724 (2d Dept. 2000); *People v. Bradshaw*, 76 A.D.3d 566, 571 (2d Dept. 2010). Judged by the foregoing standards, it is clear that

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P.O. Pampera did not have probable cause to arrest the appellant when he apprehended him.

According to P.O. Pampera, the only information contained in the radio call to which he responded was that a robbery was being committed at 105th Street and Northern Boulevard and that the perpetrators were “male Blacks, wearing a white shirt, black pants” (HA25). The call did not describe the approximate age, height or weight of any of the perpetrators, or any of their distinctive facial features. Moreover, other than the colors indicated, the call did not specify what type of shirt or pants any of the perpetrators were wearing. Thus, while the appellant may have matched the vague and generalized description that P.O. Pampera heard, it could not be concluded that the information furnished by the radio call established the existence of probable cause to arrest him. *People v. Gunter*, 158 A.D.2d 541, 542 (2d Dept. 1990); *People v. Hargroves*, *supra*.

Nor was probable cause established by the assertion that the appellant was holding a cell phone when P.O. Pampera observed him. While his holding of an iPhone attained significance retrospectively when Tarek El Turkey later identified it, at the time it was observed in the appellant’s hand by P.O. Pampera, it was of no significance at all since the radio call did not indicate that a cell phone had been taken during the reported robbery. And while the appellant’s statement that he had

purchased or gotten the phone in the area might have aroused P.O. Pampena's curiosity, and provided him with a basis for making some inquiry, it certainly did not furnish him with probable cause to arrest the appellant. *See People v. Howard*, 50 N.Y.2d 583, 590 (1980) ("[t]here was, therefore, basis for questioning defendant, but there was nothing that made permissible any greater level of intrusion").

Nor did P.O. Pampena's assertion that the appellant was running when he first observed him warrant a finding that there was probable cause to believe that he had committed the robbery then being investigated. This was not a case where the suspect fled or attempted to flee after being confronted by the police, a circumstance that might have contributed to a finding of reasonable suspicion that he was engaging in some unlawful activity. *People v. Holmes*, 81 N.Y.2d 1056, 1058 (1993). On the contrary, the record discloses that the appellant stopped running as soon as P.O. Pampena approached him and made no attempt to flee thereafter. Nor did the appellant exhibit any evasive or furtive behavior that might have raised the officer's level of suspicion. *People v. Benjamin*, 51 N.Y.2d 267 (1980). And P.O. Pampena never asserted that anything the appellant had done caused him to fear for his safety. *People v. Salaman*, 71 N.Y.2d 869, 870 (1988). In short, under all of the circumstances that existed at the time of the encounter, there was insufficient evidence to support a finding that there was reasonable cause to believe that the

appellant had committed a crime, let alone that there was probable cause to justify his arrest. *People v. Clermont*, 133 A.D.3d 612, 614 (2d Dept. 2015).

In sum, since it was unreasonable for P.O. Pampena to arrest and search the appellant, the cell phone and U.S. currency recovered from his person should have been suppressed since those items were not seized incident to a lawful arrest. *People v. Baker*, 20 N.Y.3d 354, 363-64 (2013). Moreover, although the appellant's initial statement to P.O. Pampena that he had purchased or gotten the cell phone at 105th Street and Northern Boulevard was made prior to his actual arrest, and was alleged to have been spontaneously made, it was nevertheless uttered in response to the officer blocking his path by driving and stopping his vehicle directly in front of him, an act that amounted to an unlawful seizure since it significantly interrupted the appellant's "liberty of movement". *People v. De Bour*, 40 N.Y.2d at 216. As such, it cannot be concluded that the statement was truly spontaneous and not the result of P.O. Pampena's unlawful provocation. *People v. Stoesser*, 53 N.Y.2d 648, 650 (1981). And since the appellant's detention was unjustified, the identification by El Turkey, and the appellant's subsequent statement, both of which were the direct result of the unlawful police activity, should have been suppressed as well. *People v. Dodt*, 61 N.Y.2d 408, 417 (1984). For these reasons, the appellant's conviction must be reversed. Moreover, since El Turkey did not make an in-court identification of the

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appellant at trial, and since suppression of the physical evidence, showup identification and statements would leave the People with no evidence with which to prosecute the appellant, the indictment should be dismissed. *People v. Dickerson*, 153 A.D.2d 897 (2d Dept. 1989).

POINT II

THE APPELLANT WAS DENIED HIS DUE PROCESS RIGHT TO A FAIR TRIAL WHEN THE PEOPLE ELICITED THIRD-PARTY TESTIMONY FROM A POLICE OFFICER THAT HE WAS IDENTIFIED IN A SHOWUP PROCEDURE BY THE COMPLAINING WITNESS.

A review of the trial record clearly discloses that Tarek El Turkey was the only eyewitness to the robbery in which the appellant allegedly participated. It is equally clear that El Turkey did not identify the appellant as one of the perpetrators of that crime at trial. However, the People did elicit testimony from P.O. Pampena that El Turkey had identified the appellant during a showup procedure that he had arranged after transporting the appellant to the location where El Turkey was being treated by medical technicians. It is submitted that this third-party identification testimony was erroneously admitted and that the error was not harmless because it deprived the appellant of his due process right to a fair trial. The judgment of conviction must therefore be reversed.

The eliciting of an identification by an eyewitness through the testimony of a police officer has been repeatedly held to be so prejudicial as to require the reversal of a resulting conviction. *People v. Trowbridge*, 305 N.Y. 471 (1953); *People v. Caserta*, 19 N.Y.2d 18 (1966); *People v. Holt*, 67 N.Y.2d 819 (1986). The prohibition against such testimony avoids the danger that a jury might endow an identification “with an undeserved aura of trustworthiness” as a result of a police officer’s official confirmation of another’s identification. *Trowbridge, supra* at 477; *People v. Veal*, 158 A.D.2d 633, 634 (2d Dept. 1990); *People v. Rankins*, 81 A.D.3d 857, 858 (2d Dept. 2011).

An exception to the so-called bolstering prohibition is codified in Section 60.25 of the Criminal Procedure Law which provides, in pertinent part, as follows:

1. In any criminal proceeding in which the defendant’s commission of an offense is in issue, testimony as provided in subdivision two may be given by a witness when:

- (a) Such witness testifies that:

- (i) He observed the person claimed by the people to be the defendant either at the time and place of the commission of the offense or upon some other occasion relevant to the case; and (ii) On a subsequent occasion he observed, under circumstances consistent with such rights as an accused person may derive under the constitution of this state or of the United States, a person whom he had observed on the

first or incriminating occasion; and (iii) He is unable at the proceeding to state, on the basis of present recollection, whether or not the defendant is the person in question; and

(b) It is established that the defendant is in fact the person whom the witness observed and recognized on the second occasion. Such fact may be established by testimony of another person or persons to whom the witness promptly declared his recognition on such occasion.

To invoke the use of Section 60.25, and elicit a past identification by another person, the prosecution must lay a detailed evidentiary foundation since the authorization contained in the statute is specific and limited. *People v. Patterson*, 93 N.Y.2d 80, 82 (1999) (holding that the statute cannot be invoked to admit a prior identification of a witness who died prior to trial); *People v. Quevas*, 81 N.Y.2d 41, 45 (1993) (ambiguity as to whether a witness can make an in-court identification is not a sufficient foundation); *People v. Bayron*, 66 N.Y.2d 77, 82 (1985) (holding that the statute does not apply where a witness fails to identify the defendant due to fear). In any event, before third-party identification testimony will be permitted, the prosecution must establish that the witness is unable to identify the perpetrator of the offense because he lacks present recollection. *People v. Victor*, 271 A.D.2d 556, 557 (2d Dept. 2000); *People v. Kopliku*, 37 A.D.3d 496 (2d Dept. 2007); *People v. Hudson*, 201 A.D.2d 503 (2d Dept. 1994); *People v. Polite*, 228 A.D.2d 705 (2d Dept. 1996). Based upon the foregoing, it cannot be concluded that the testimony of P.O.

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Pampena, which confirmed El Turkey's prior identification of the appellant, was properly admitted.

A review of the trial record reveals that when the prosecutor questioned El Turkey regarding his prior identification of the appellant, and whether he recognized the appellant as one of the perpetrators, the following exchange took place:

Q. Who did the police officers bring to show you?

A. He bring the homeless.

Q. Did you recognize the person?

A. He bring the homeless – you want me –

THE COURT: They brought the homeless guy to you?

THE WITNESS: Yes.

THE COURT: Okay.

Q. Who was that person, what did he do to you?

A. The homeless?

Q. Yes.

A. He was the one behind me and the one he took the money and phone.

Q. That was the person the police had in custody?

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A. Yes.

Q. I'm going to ask you to take a look around the courtroom and see if you recognize the person they had in custody?

THE DEFENDANT BALL: Asked and answered, your Honor.

Q. Overruled. You can look around.

A. You mean the homeless guy?

Q. Yes.

A. No. I know him very well. No.

Q. Are you sure the person police had there the homeless guy was the person that assaulted you –

MR. SHORTT: Withdrawn.

Q. Are you sure the person the police arrested was the person who took your property?

A. Yes.

Q. Can you remember what that person looked like today?

A. The homeless or the heavy guy?

MR. GIBBONS: Objection.

THE COURT: Overruled. What did he look like?

A. Sometimes he acted like a gay, act like a woman sometime, this is the homeless guy.

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Q. Okay. Do you recall what the homeless guy was wearing the day he assaulted you?

A. I guess jeans and white shirt.

MR. SHORTT: No further questions, your Honor.

(384-386).

It is clear from the preceding exchange that El Turkey was sure that he had accurately identified the individual he described as the homeless man, whom the People contended was the appellant, when the police exhibited him to El Turkey on the night of the charged offense. Thus, it appears that the People satisfied the first and second foundational prongs in Section 60.25 which require proof that the witness observed the perpetrator during the charged offense, and that he subsequently recognized the person whom he had observed "on the first or incriminating occasion". *People v. Patterson*, 93 N.Y.2d at 82. However, it is equally clear that the People failed to establish that El Turkey lacked present recollection to identify the appellant as the perpetrator, the third foundational prong required for invoking Section 60.25.

For one thing, El Turkey never testified that he was unable to identify the perpetrator he described as the homeless man due to his lack of present recollection. Indeed, the prosecutor never even asked El Turkey directly if he was unable to identify that individual in court because his memory of the event had

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dimmed due to the passage of time. And the fact that the prosecutor had asked that question when he sought unsuccessfully an in-court identification of the perpetrator he described as the heavyset man, whom it was contended was co-defendant Elijah Brooks, did not relieve the People of the duty to lay the same foundation with respect to his lack of recognition of the second perpetrator, particularly since El Turkey claimed that he had a prior acquaintance with that man but no such prior acquaintance with the heavyset man.

Moreover, the record discloses that when he was asked by the trial judge if he saw “the homeless guy” in the courtroom, El Turkey responded, “No. I know him very well. No” (385). This response was not an assertion that El Turkey could not identify the homeless man as one of the two perpetrators because he lacked present recollection to do so. Instead, it was an unambiguous assertion by El Turkey that the man who had stolen his wallet and cell phone was not seated in the courtroom and that therefore, the appellant was not one of the perpetrators of the crime in question. In any case, it cannot be concluded that the People laid an adequate foundation to allow P.O. Pampera to testify to El Turkey’s showup identification of the appellant.

While it must be conceded that the appellant did not make a contemporaneous objection to P.O. Pampera’s testimony regarding El Turkey’s prior

identification, this Court should nevertheless consider the error in the interest of justice pursuant to Section 470.15 (3) of the Criminal Procedure Law. *See People v. Hall*, 82 A.D.2d 838, 839 (2d Dept. 1981). Allowing P.O. Pampera to testify to El Turkey's prior identification of the appellant was a truly monumental error in this case. Without this testimony, the People would have been unable to present direct evidence of the appellant's participation in the robbery of El Turkey.² And the People would have surely been hard pressed to persuade the jury that the evidence established the appellant's guilt of robbery in the second degree beyond a reasonable doubt.

For many of the same reasons, the error in permitting P.O. Pampera's identification testimony cannot be deemed harmless. *People v. Crimmins*, 36 N.Y.2d 230, 243 (1975). At the very least, there is a significant probability that the appellant would have been acquitted of robbery if the officer's testimony were excluded. Under the circumstances, it cannot be said that the erroneously admitted testimony did not contribute to the verdict. Accordingly, the appellant's conviction should be reversed and a new trial ordered.

²Though the appellant was found in possession of El Turkey's iPhone and denominations of U.S. currency that matched what had been taken from El Turkey, his recent and exclusive possession of such items provided circumstantial evidence of guilt, but did not furnish the jury with direct evidence of his culpability. *See People v. Schillaci*, 68 A.D.2d 124, 128 (2d Dept. 1979).

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POINT III

THE APPELLANT'S DECISION TO PROCEED TO TRIAL *PRO SE* WAS NOT MADE KNOWINGLY AND VOLUNTARILY. ACCORDINGLY, HIS WAIVER OF HIS RIGHT TO COUNSEL WAS INEFFECTIVE AND A NEW TRIAL IS REQUIRED.

Long before the trial began, it appears that the appellant had expressed dissatisfaction with his assigned counsel. Indeed, he expressed that dissatisfaction throughout the suppression hearing. And although the hearing court reminded the appellant that his request to relieve assigned counsel and either proceed *pro se* or have new counsel assigned had been denied prior to the reopening of the suppression hearing (HB2-HB3), the appellant was permitted to question a witness at that hearing after his assigned counsel had completed her questioning (HB39-HB45). As the trial was about to commence, the trial court engaged in a colloquy with the appellant regarding his purported desire to proceed *pro se*. In the course of that colloquy, the appellant again expressed his dissatisfaction with his assigned counsel, stating, "it's hard for a black man to get the proper representation here in the judicial system, you know, what is it that it provides for, it really puts us in, how do you say, awkward position. Sometimes we really don't have a choice in the matter in the case that we want to be represented" and that he had explained to another judge who had presided over the case that "it was ... [assigned counsel's] inadequacy as a representation that

played a big role in making this choice [to proceed *pro se*]" (4-5). After further colloquy was conducted, the trial court concluded that the appellant had knowingly, intelligently and voluntarily waived his right to counsel and permitted him to represent himself at trial (5-16). This conclusion was erroneous. A new trial is therefore required.

"The constitutional right to counsel is fundamental to our system of justice". *People v. Arroyo*, 98 N.Y.2d 101, 103 (2002), *citing* U.S. Const., Amend. VI; N.Y. Const., art. I, § 6. Indeed, the Supreme Court has stated that the right to counsel "is one of the safeguards ... deemed necessary to insure fundamental human rights of life and liberty". *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938). Thus, the right to counsel is considered so fundamental to our adversarial system that its deprivation can never be deemed harmless. *Chapman v. California*, 386 U.S. 18, 23 & n.8 (1967).

Of course, a criminal defendant's right to be represented by counsel may be waived since the right to the assistance of counsel "implicitly embodies a 'correlative right to dispense with a lawyer's help'". *Faretta v. California*, 422 U.S. 806, 814 (1975), *quoting* *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942). In recognition of this principle, our State Constitution provides, "In any trial in any court whatever the party accused shall be allowed to appear and defend in

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person or with counsel". See *People v. McIntyre*, 36 N.Y.2d 10, 14 (1974) (holding that the right of self-representation embodies the right of an individual to determine his own fate). However, before a defendant may proceed *pro se*, he must make a knowing, voluntary and intelligent waiver of the right to counsel. *People v. Slaughter*, 78 N.Y.2d 485, 491 (1991); *People v. Vivienzo*, 62 N.Y.2d 775, 776 (1984).

To determine whether a defendant's decision to waive his right to counsel is truly knowing, voluntary and intelligent, a trial court must undertake a "searching inquiry" of the defendant. *People v. Slaughter*, 78 N.Y.2d at 491, citing *Faretta v. California*, 422 U.S. at 835. A defendant need not be versed in criminal procedure to exercise his right of self-representation. *People v. McIntyre*, 36 N.Y.2d at 17-18. Otherwise, the right of self-representation would be rendered meaningless. *People v. Davis*, 49 N.Y.2d 114, 120 (1979). And the fact that such a decision may be imprudent, or that he would be better served with counsel is of no consequence since a defendant "is entitled to be master of his own fate" and "respect for individual autonomy requires that he be allowed to go to jail under his own banner if he so desires and if he makes the choice with eyes open". *People v. Vivienzo*, 62 N.Y.2d at 776, quoting *United States ex rel. Maldonado v. Denno*, 348 F.2d 12, 15 (2d Cir. 1965).

The Court of Appeals has enunciated three criteria for determining a defendant's application to proceed *pro se*. First, the request must be unequivocal and timely asserted. Second, the record must demonstrate that there has been a knowing and intelligent waiver of the right to counsel. And third, it must be demonstrated that the defendant "has not engaged in conduct which would prevent the fair and orderly exposition of the issues." *People v. McIntyre*, 36 N.Y.2d at 17. A defendant's request to proceed *pro se* is not unequivocal where he does not assertively state that he wants to represent himself or states that he sees self-representation as a "last resort" due to his disagreement with his counsel. *People v. LaValle*, 3 N.Y.3d 88, 106 (2004). *See also People v. Gillian*, 8 N.Y.3d 85, 88 (2006) (request to proceed *pro se* not unequivocal where request made only because court refused to replace assigned counsel who displeased defendant); *People v. Ested*, 129 A.D.3d 858, 859 (2d Dept. 2015) (same).

Here, the appellant's request to proceed *pro se* was not unequivocal. It is apparent that throughout the pre-trial proceedings, the appellant experienced fundamental differences with his assigned counsel and that he repeatedly expressed his dissatisfaction with counsel to the various judges who were presiding over the case. At the commencement of the re-opened suppression hearing, he reminded the hearing court, "[the] last time I was in front of you I asked you to allow me to go pro

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se or have another lawyer represent me in the case. I don't feel ... [defense counsel] will properly represent me. And she has been negligent, you know, in her duties in defending me" (HB2). After this exchange continued, the hearing court stated, "As far as changing counsel, at this point the application is denied" (HB3). In the same vein, when the trial was about to commence and the trial court questioned him as to whether he'd been threatened or coerced into proceeding *pro se*, the appellant stated, "No, no one threatened or coerced me in that way, but – you know for a black man to get the proper representation here in the judicial system, you know, what is it that it provides for, it really puts us in, how do you say, awkward position. Sometimes we really don't have a choice in the matter in the case that we want to be represented" (4) (emphasis supplied).

The foregoing statements by the appellant did not express an unequivocal request to proceed *pro se*, particularly the one where he indicated that he felt that he didn't "have a choice in the matter". Rather, the appellant's statements actually reflected dissatisfaction with his present assigned counsel and a desire to have new counsel assigned. Under the circumstances, the hearing court and the trial court should have conducted further inquiries into the sources of the appellant's dissatisfaction with his counsel as part of their continuing duty to ensure that his rights were protected throughout the course of the proceedings. *See People v.*

Medina, 44 N.Y.2d 199, 207 (1978). And the trial court certainly should not have treated the appellant's complaints about his assigned counsel as an unequivocal request to proceed *pro se*. See *People v. Littlejohn*, 92 A.D.3d 898 (2d Dept. 2012).

Moreover, the record does not support the conclusion that the appellant's waiver of his right to counsel was knowing, voluntary and intelligent. While the trial court did ask the appellant basic questions regarding his educational background and his understanding of the legal process, it did not fully inform him of the hardships he would face or the fundamental rights he would be waiving by proceeding without counsel. *People v. Mitchell*, 61 N.Y.2d 580, 585 (1984). Nor did the trial court impress upon the appellant the seriousness of the charges against him or advise him of the punishment he was facing if convicted of those charges.³ Under the circumstances, it cannot be concluded that his waiver of his right to counsel was either knowing, intelligent or voluntary. *People v. Arroyo*, 98 N.Y.2d 101, 104 (2002).

In sum, the record does not support the conclusion that the appellant's waiver of his right to counsel was effective. His conviction must therefore be reversed and a new trial ordered.

³As a second felony offender, the appellant faced a maximum term of imprisonment of 15 years upon his conviction of robbery in the second degree.

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POINT IV

THE IMPOSITION OF A 10 YEAR SENTENCE OF IMPRISONMENT WAS UNDULY HARSH AND EXCESSIVE AND SHOULD, IN THE INTEREST OF JUSTICE, BE REDUCED.

Upon his conviction of two counts of robbery in the second degree, the appellant was sentenced to concurrent determinate terms of imprisonment of 10 years, to be run concurrently with a definite term of imprisonment of one year on the criminal possession of stolen property in the fifth degree count. In the event this Court declines to reverse the appellant's conviction for the reasons set forth in Points I, II and III herein, it should, nevertheless, order that his sentence be reduced in the interest of justice.

It is well settled that sentencing determinations are generally left to the sound discretion of the trial court. *People v. Notey*, 72 A.D.2d 279, 282 (2d Dept. 1980). However, that discretion is not without limits. *People v. Naranjo*, 89 N.Y.2d 1047, 1049 (1997). Section 470.15 (6) (b) empowers this Court to modify a sentence of imprisonment that it deems unduly harsh even where the sentence falls within the statutory guidelines. *People v. Thompson*, 60 N.Y.2d 513 (1983). Moreover, in exercising this power, this Court need not defer to the finding of the sentencing court. *People v. Delgado*, 80 N.Y.2d 780, 783 (1992) (holding that an intermediate appellate

court has “broad plenary power to modify a sentence that is unduly harsh or severe” and may exercise such power “if the interest of justice warrants”). In this case, while the 10 year prison sentence was certainly not illegal as a matter of law, it was unnecessarily harsh and severe and should therefore be reduced.

It cannot be disputed that the offense committed against Tarek El Turkey was a serious one and that substantial punishment was warranted for any individual who participated in that offense. However, the record discloses that the appellant did not initiate the attack on El Turkey. Nor did he personally cause any injury to El Turkey. Moreover, while El Turkey’s injuries were certainly substantial, they were not as serious as what is frequently seen in a second degree robbery. And while the appellant’s theft of El Turkey’s wallet and cell phone certainly provided evidence of his culpability as an accomplice, his role in the offense was somewhat more limited and less blameworthy than his co-defendant who stalked, assaulted and repeatedly threatened El Turkey. When it is further considered that the appellant was described as a homeless man , it is fair to conclude that he was not the prime mover in the charged offense and that his participation in the offense was induced by his far more violent co-defendant.

The appellant’s decision to proceed to trial *pro se* was certainly not a prudent one. Indeed, as discussed in Point III herein, his purported waiver of his right

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to counsel should not have been accepted. However, in attempting to defend himself, the appellant displayed a remarkable degree of courtesy and respect for the judicial process. At no time during the trial did he behave in a contemptuous manner. On the contrary, he accepted the trial court's adverse rulings with more grace than some attorneys show, on occasion. In short, while it certainly cannot be said that the appellant has led an exemplary life, the manner in which he comported himself at trial suggests that he is an intelligent and respectful man who can achieve rehabilitation and can become a productive member of society under the right circumstances.

In sum, there is ample reason to conclude that a lesser term of imprisonment would serve as adequate punishment for the appellant's offense, while maintaining the goals of deterrence and societal protection. *People v. Farrar*, 52 N.Y.2d 302, 305 (1981). Accordingly, the judgment of conviction should be modified and the sentences for the second degree robbery counts reduced to concurrent determinate terms of imprisonment of five years.

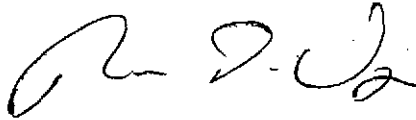
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CONCLUSION

For the reasons stated in Point I herein, the appellant's conviction should be reversed and the indictment dismissed. In the alternative, for the reasons stated in Points II and III herein, the appellant's conviction should be reversed and a new trial ordered. In the alternative, for the reasons stated in Point IV herein, the appellant's sentence should be reduced.

Dated: Bayside, New York
August, 2016

Respectfully submitted,



RANDALL D. UNGER
Attorney for Defendant-Appellant
Raymond Ball
42-40 Bell Boulevard, Suite 302
Bayside, New York 11361
(718) 279-4500

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CERTIFICATE OF COMPLIANCE
PURSUANT TO 22 NYCRR § 670.10.3(f)

The foregoing reply brief was prepared on a computer. A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman
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The total number of words in the reply brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules or regulations is 7,874.

SR040

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

-----X
THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

AD No. 2015-01907

RAYMOND BALL,

Defendant-Appellant.
-----X

STATEMENT PURSUANT TO CPLR 5531

1. The indictment number in the lower court was 2228/2012.
2. The full names of the original parties were People of the State of New York against Raymond Ball and Elijah Brooks. Only Raymond Ball brings the instant appeal.
3. The action was commenced in the Supreme Court, Queens County.
4. The action was commenced by the filing of an indictment.
5. The appeal is from a March 4, 2015 judgment convicting the appellant of robbery in the second degree (two counts), assault in the third degree and criminal possession of stolen property in the fifth degree, and sentencing him to concurrent terms of imprisonment of 10 years on the first two counts and definite terms of imprisonment of one year on the third and fourth count (Barry A. Schwartz, J.).
6. The appeal is being perfected on the original record.

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To be argued by
MEREDITH D'ANGELO
(TIME REQUESTED: 15 MINUTES)

New York Supreme Court

Appellate Division--Second Department

AD No. 15-01907

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

RAYMOND BALL,

Defendant-Appellant.

BRIEF FOR RESPONDENT

RICHARD A. BROWN
District Attorney
Queens County
Attorney for Respondent
125-01 Queens Boulevard
Kew Gardens, New York 11415
(718) 286-5984

JOHN M. CASTELLANO
JOHNNETTE TRAILL
RONI C. PIPLANI
MEREDITH D'ANGELO
Assistant District Attorneys
Of Counsel

OCTOBER 14, 2016

Queens County
Indictment Number 2228/12

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SUPREME COURT OF THE STATE OF NEW YORK
 APPELLATE DIVISION: SECOND DEPARTMENT

-----X

THE PEOPLE OF THE STATE OF NEW YORK, :

Respondent, :

-against- :

RAYMOND BALL, :

Defendant-Appellant. :

----- X

BRIEF FOR RESPONDENT

PRELIMINARY STATEMENT

Defendant Raymond Ball appeals from a March 4, 2015, judgment of the Supreme Court, Queens County (Schwartz, J.). By that judgment, defendant was convicted, after a jury trial, of two counts of Robbery in the Second Degree (Penal Law §§ 160.10[1], [2][a]), one count of Assault in the Third Degree (Penal Law § 120.00[1]), and one count of Criminal Possession of Stolen Property in the Fifth Degree (Penal Law § 165.40).

Defendant was sentenced to determinate terms of imprisonment of ten years with five years post release supervision on the second degree robbery convictions, to run concurrently, one year on the third degree assault conviction, and one year on the fifth degree possession of stolen property

conviction, both of which merged with the sentences on the robbery convictions. Defendant is currently incarcerated pursuant to this judgment of conviction.

INTRODUCTION

On July 3, 2012, defendant and co-defendant, Elijah Brooks, robbed Tarek Elturkey.¹ They followed Elturkey as he left a deli, and co-defendant pushed Elturkey to the ground. While defendant held Elturkey's hands down, co-defendant repeatedly punched Elturkey in the face and repeatedly slammed his head against the curb. Defendant then reached into Elturkey's pockets and stole his iPhone and his wallet, which contained \$250. Defendant and co-defendant then ran away. Elturkey sustained a laceration and bleeding to his forehead, the back of his head, and mouth; scratches to his back; a swollen, black and blue eye; and he lost a tooth. Minutes later, defendant was apprehended one block from the robbery with \$250 and the stolen iPhone in his possession. Elturkey identified defendant in a showup, and defendant stated, "if the guys said it was his then I guess it was his."

¹ On March 4, 2015, co-defendant Elijah Brooks was convicted, after a joint jury trial with defendant, of two counts of Robbery in the Second Degree (Penal Law §§ 160.10[1], [2][a]), and one count of Assault in the Third Degree (Penal Law § 120.00[1]), and sentenced to determinate terms of imprisonment of ten years with five years post release supervision on the two second degree robbery convictions, to run concurrently, and one year on the third degree assault conviction, which merged with his other sentences (Schwartz, J.).

Defendant was arrested and was charged with two counts of second degree robbery, one count of third degree assault, and one count of fifth degree criminal possession of stolen property (Queens County Indictment No. 2228/12).

On January 20, 2015, defendant proceeded to trial before Justice Schwartz, of the Supreme Court, Queens County and a jury. At the conclusion of the trial, defendant was convicted of all four counts and was sentenced on March 4, 2015, as noted above (Schwartz, J., at trial and sentence).

On appeal, defendant raises four claims. First, he argues that the hearing court erred in denying his motion to suppress physical evidence, statements, and identification evidence. Second, he claims that he was denied his right to a fair trial when the People elicited third party testimony from a police officer that defendant was identified by the victim in a show up procedure. Third, he claims that his waiver of the right to counsel was not unequivocal and was not made knowingly, intelligently, and voluntarily. Fourth, he argues that his sentence was excessive. Defendant's second claim is unpreserved, and all of his claims lack merit.

STATEMENT OF FACTS**THE DUNAWAY/HUNTLEY/MAPP/WADE HEARING****The People's Case**

On July 3, 2012, at approximately 9:00 p.m., Police Officer DANIEL LANNING received a radio run while on patrol in an unmarked car with Sergeant Rosenberg for a male being robbed at knifepoint at 104-22 Northern Boulevard by three black men, and one of the robbers was dressed in a white shirt and black pants (Lanning: 5, 7, 11).² With Lanning seated in the passenger seat, Rosenberg drove two blocks to that location. Lanning was not in uniform (Lanning: 6).

The victim, Tareek Elturkey, was standing on the corner of 105th Street and Northern Boulevard. He was bleeding from the head and mouth and looked like he had been “beaten up” (Lanning: 7). Elturkey told Lanning that he had been robbed and then pointed southbound on 105th Street and said the perpetrators went in that direction (Lanning: 7, 12). Elturkey got into Lanning’s car and they drove southbound on 105th Street (Lanning: 7). After traveling only halfway down the very next block, Elturkey pointed at co-

² Citations with last names refer to minutes from the hearing that took place on May 21, 2013. Citations with last names followed by “RH” refer to minutes from the re-opened hearing that took place on January 8, 2014.

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defendant, who was in the street, and identified him as one of the perpetrators (Lanning: 8, 16). Lanning got out of his car and handcuffed and detained co-defendant.

On July 3, 2012, at approximately 8:59 p.m., Police Officer ANGELO PAMPENA received a radio run while on patrol in a “plain police car” for a robbery in progress at 104-22 Northern Boulevard, which was only three blocks away from him (Pampena: 23, 34). Pampena was in uniform (Pampena: 23). The perpetrators were described as male blacks, wearing “white shirt and black pants” (Pampena: 25). As he was driving to that location, Pampena saw a black male wearing a white shirt and black pants, running towards Pampena’s car on 105th Street, only one or one and a half blocks from the crime scene (Pampena: 25, 36, 39). Pampena stopped his car and got out. Before Pampena said anything, defendant, who was holding an iPhone, spontaneously said, “I bought this phone from 105 Street and Northern Boulevard” (Pampena: 26). Pampena then handcuffed and detained defendant, searched him for weapons, and found \$250 in his pocket, in the denominations of one \$100 bill, seven \$20 bills, and one \$10 bill (Pampena: 27). Defendant had no blood, cuts, or bruises, but his clothes were disheveled (Pampena: 42).

Pampena drove to the robbery location with defendant in his back seat (Pampena: 27).

When Pampena arrived at the corner of 105th Street and Northern Boulevard at 9:03 p.m., Emergency Medical Technicians (“EMT”) were treating Elturkey inside an ambulance (Pampena: 27, 34). Elturkey was bleeding from his mouth. His clothes were ripped, disheveled, and covered in blood, and he had blood on his face and head, a large laceration on his head, and a swollen shut, black-and-blue eye (Pampena: 28). Elturkey told Pampena that after he left a “check cashing place,” co-defendant, a “big black guy” with a bald or shaved head, started the “beating” and defendant, “a smaller black guy,” “ensued with the beating” (Pampena: 27, 29, 52-53). He explained that co-defendant punched and kicked his face and body and that defendant took his iPhone and wallet, which contained \$250, from his pockets during the attack (Pampena: 27-29, 51, 52). Elturkey was able to tell Pampena the exact denominations of the bills – one \$100 bill, seven \$20 bills, and one \$10 bill – because he had just taken the money out of an ATM (Pampena: 27).

Elturkey looked out the open back doors of the ambulance he was in and identified defendant, who was facing the ambulance and standing approximately three car lengths away, as the person who took his iPhone and

wallet (Pampena: 28, 31-32, 46-47). Defendant was handcuffed with his hands behind his back and was standing in front of Pampena's car, with one uniformed police officer next to him (Pampena: 44-45, 47). Pampena, who was also in the ambulance, could not see defendant's hands (Pampena: 48). Pampena brought the iPhone to Elturkey but did not tell him where he recovered it, and Elturkey gave him the correct password to unlock the phone (Pampena: 32, 49). Pampena then placed defendant in his car (Pampena: 33). Defendant asked what he was being charged with and, when Pampena responded, "robbery," defendant replied, "if the guy said it was his then I guess it was his" (Pampena: 33).

Defendant's Case

Defendant did not call any witnesses or present any evidence.

The Court's Decision

In an oral decision dated May 21, 2013, the court denied defendant's motion to suppress the recovered cash and iPhone, defendant's statements, and the identification evidence (Decision: 63-64). First, the court fully credited Lanning's and Pampena's testimony (Decision: 59). Then, the court held that there was probable cause to arrest defendant based on the facts that he matched the description given over the radio run; he volunteered that

he just came from the scene of the robbery; the victim told Pampena what defendant had done and that an iPhone and \$250, made up of one \$100 bill, seven \$20 bills, and one \$10 bill, were stolen from him; the iPhone and \$250 cash, made up of the same denominations, were found on defendant; the victim knew the password for the iPhone; and based on defendant's statement (Decision: 62). Next, the court found that the identification procedure lacked suggestiveness because it happened quickly after the robbery and took place a very short distance from the robbery (Decision: 63). Further, the court held that the property was lawfully recovered as a result of a search incident to a lawful arrest (Decision: 63). Last, the court held that defendant's statements were voluntary because they were not made in response to any questions (Decision: 63-64).

THE RE-OPENED DUNAWAY/HUNTLEY/MAPP/WADE HEARING

On January 8, 2014, the court permitted defendant to re-open the hearing in order to question the witnesses about an Emergency Medical Services ("EMS") report that was not available earlier.

The People's Case

The People did not present any additional witnesses or evidence.

The Defendant's Case

Using the previously unavailable EMS report, defense counsel asked Lanning and Pampena several questions. In response, Lanning testified that the victim was “a little swollen in the face” and was bleeding from his mouth and the top of his face, but he was not squinting or wiping his eyes when he identified co-defendant (Lanning RH: 16, 19-20). The victim was sitting in the rear passenger seat of Lanning’s car when he initially identified co-defendant, who was with another man and was walking quickly towards their car, on the same side as the passenger side (Lanning RH: 17-18). Co-defendant was about nine to ten feet from the car at that point and, although it was dark outside, the sidewalk was well lit (Lanning RH: 18). Lanning and the victim got out of the car and the victim, who was about two to three feet from co-defendant, pointed at co-defendant and again said, “That’s him” (Lanning RH: 22-23). Although Lanning stopped and detained co-defendant, Pampena made the arrest (Lanning RH: 28).

Pampena testified that he stopped defendant at approximately 9:00 p.m. and he arrived at the scene of the robbery at approximately 9:05 p.m. (Pampena RH: 32-33). Pampena placed both defendant and co-defendant under arrest at 9:13 p.m. (Pampena RH: 31). Elturkey had one swollen black

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eye, and a laceration on his head; his clothes were ripped and bloodied; and it looked like “he just got jumped, beat up, mugged” (Pampena RH: 34, 36). As Pampena was sitting “shoulder to shoulder” with Elturkey and talking to him, as EMT’s cleaned blood off of Elturkey’s head with gauze (Pampena RH: 34-35). He did not see the EMT’s clean blood from around Elturkey’s eyes, and Elturkey was not slurring his speech (Pampena RH: 46, 48). Pampena had an independent of recollection of Elturkey’s physical condition; it was not based on any aided reports (Pampena RH: 38). After being treated by EMT’s, Elturkey refused further treatment at a hospital (Pampena RH: 41).

The Court’s Decision

In a written decision dated January 14, 2014, the court denied defendant’s motion to suppress the recovered cash and iPhone, defendant’s statements, and the identification evidence (Decision: 63-64). The court did not give any additional bases for its decision other than those in its prior decision dated May 21, 2013.

THE TRIAL

The People’s Case

On July 3, 2012, TAREK ELTURKEY left his house at 8:30 p.m., walked to an ATM on 106th Street and Northern Boulevard, which was

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one block from his home, and withdrew \$260 (Elturkey: 341-42, 357). The \$260 was comprised of all \$20 bills (Elturkey: 357). After leaving the ATM, he visited his friend at a deli located at 105th Street and Northern Boulevard (Elturkey: 341-42). Before entering the deli, Elturkey saw defendant, who he described as a black homeless man whom he had seen three or four other times over the course of a month to a month and a half prior to that night, and he was always begging outside of that deli (Elturkey: 344-45). Elturkey also described defendant as a skinny man who had short, tight curly hair that looked like dread locks and who was shorter than five foot six inches (Elturkey: 421). Elturkey had “always” given defendant a “dollar or coffee or something” (Elturkey: 344). On this night, Elturkey saw defendant standing with a “bunch of guys” on the corner of 105th Street and Northern Boulevard (Elturkey: 345). Elturkey bought a \$10 pack of cigarettes with one of his \$20 bills, leaving him with \$250 made up of twelve \$20 bills and one \$10 bill (Elturkey: 358-59). Elturkey then exchanged five of his \$20 bills with another customer for one \$100 bill, which left him with one \$100 bill, seven \$20 bills, and one \$10 bill (Elturkey: 258).

As Elturkey left the deli and started to walk down 105th Street, he noticed co-defendant following him (Elturkey: 347). Co-defendant had short

hair and was “taller than me and maybe heavy. . . like 300 pounds. . . like 250 pounds, black guy wearing like white shirt and dark jeans. . . short hair” (Elturkey: 349). While still on 105th Street, Elturkey turned around to walk back toward the deli because he felt unsafe. At that point, co-defendant, who was standing in front of Elturkey, yelled to defendant to punch or attack Elturkey. Co-defendant then pushed Elturkey in between two parked cars (Elturkey: 352-53, 363). Defendant was standing behind Elturkey at that point, and Elturkey fell down, into defendant (Elturkey: 363-64). Defendant grabbed Elturkey’s hands and stood up, causing Elturkey’s head to fall backwards and hit the sidewalk (Elturkey: 364). Defendant placed his knees over Elturkey’s hands, pinning him down, and co-defendant repeatedly punched Elturkey in the face and slammed his head against the sidewalk multiple times (Elturkey: 364-66, 400-01). Co-defendant told Elturkey, “I’ll kill you, motherfucker” (Elturkey: 368, 401). Defendant then took Elturkey’s iPhone and wallet, which contained his \$250, from Elturkey’s pants pocket (Elturkey: 367). As a result, Elturkey sustained severe pain, bleeding, a black-and-blue eye, and he lost a tooth (Elturkey: 369). When defendant and co-defendant left, Elturkey went into his friend’s deli and told him to call 911 (Elturkey: 371). Approximately

ninety seconds later, police arrived, and Elturkey got into their car (Elturkey: 373).

When the prosecutor asked Elturkey if he saw defendant in the courtroom, Elturkey stated, "He is not here" (Elturkey: 346). Elturkey was also asked if he saw co-defendant in the courtroom, and he replied, "Okay, been long time. No" (Elturkey: 353). Notably, when the prosecutor asked Elturkey what he meant by that, Elturkey replied, "I'm a person like I don't know if I see the person twenty times, I don't know what he was wearing. I mean like I always look for basic things, *but I'm not remember faces* or [sic]" (Elturkey: 353) (emphasis added). When the prosecutor again asked Elturkey to clarify what he meant, Elturkey stated that it was "like two or three years ago" (Elturkey: 354). And when the prosecutor asked Elturkey, "Are you having difficulty remembering?" Elturkey clearly stated, "Yes" (Elturkey: 354). Later, Elturkey testified that he recognized co-defendant on 105th Street as he was being driven by the police, but he did not see that person in the courtroom (Elturkey: 374, 377-78). He also testified that, at the time at trial, he was having difficulty remembering who that person was, but he was certain that the man who was arrested that night was the same person who punched him (Elturkey: 377-78). While Elturkey was being treated in the ambulance, he

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recognized defendant, who he called the “homeless man” (Elturkey: 384). When the prosecutor again asked him if he saw that man in the courtroom, Elturkey said, “No, I know him very well. No” (Elturkey: 385). Elturkey also testified that he was sure that the man who was arrested was the same person who took his property and, when asked if he remembered what that person looked like, he responded: “Sometimes he act like a gay, act like a woman sometime, this is the homeless guy. . . I guess [he was wearing] jeans and white shirt” (Elturkey: 385-86). Elturkey later testified again that his memory of the day was not very good and that he did not know of anyone by defendant’s name (Elturkey: 405, 415). Elturkey then testified that the homeless man who took his property had hair similar to defendant and he was also heavy like defendant, but he was not able to identify defendant (Elturkey: 431).

Detective DANIEL LANNING, who was a police officer at the time of the incident, was on patrol with Sergeant Rosenberg on July 3, 2012, when they received a radio run at about 9:00 p.m., advising them of a male being robbed at knifepoint by two black males, one of whom wore a white shirt and black pants, at the corner of 105th Street and Northern Boulevard (Lanning: 434, 434-39). When Lanning arrived at that location, Elturkey, who was bleeding from his face and mouth, waved him down (Lanning: 441). After

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Elturkey told Lanning that he had been robbed, Elturkey got into Lanning's car. After traveling for about five seconds southbound on 105th Street, Elturkey recognized co-defendant (Lanning: 442-43). Lanning got out of the car and stopped defendant and an unapprehended other (Lanning: 445). Elturkey identified co-defendant as the "guy" and then Lanning handcuffed co-defendant (Lanning: 447). During the trial, Lanning identified co-defendant as the man he apprehended and indicated that, at trial, defendant was wearing a black jacket (Lanning: 445). Although Lanning handcuffed co-defendant, Pampena was the designated arresting officer (Lanning: 456).

Police Officer ANGELO PAMPENA was in uniform and on car patrol in an unmarked car with Officers Troisey and Torres when he received a radio run for a robbery in progress at 105th Street and Northern Boulevard (Pampena: 499-500, 502). The perpetrators were described as three male blacks, with one man wearing a white T-shirt and black jeans (Pampena: 504). Pampena was three or four blocks from the crime scene when he received the call (Pampena: 503). Thirty seconds later, as he was driving towards that location, Pampena saw defendant, who matched the given description, running away from the crime scene (Pampena: 503, 543). As soon as Pampena got out of his car, defendant put his hands up and said that he bought the iPhone he

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was holding from 105th Street and Northern Boulevard (Pampena: 505). Pampena took the iPhone from defendant, handcuffed him, and searched him, recovering \$250 from defendant's front right pocket (Pampena: 506). The \$250 was comprised of one \$100 bill, seven \$20 bills, and one \$10 bill (Pampena: 511). Pampena put defendant in his car and then drove one more block to the crime scene (Pampena: 511).

When Pampena arrived at the crime scene, he went to the ambulance and spoke to Elturkey, whose face and ears were covered in blood, his mouth was "busted up," and his clothes were torn up and disheveled (Pampena: 512). Elturkey told Pampena what had happened and then, when Pampena pointed at defendant, Elturkey said "yes," that he was the one who had started to assault him and had stolen his property (Pampena: 512, 514). Elturkey identified the iPhone that Pampena recovered and told Pampena the exact denominations of money that had been stolen from him (Pampena: 513). After speaking with Elturkey, Pampena canvassed the area and found Elturkey's wallet, identification, and social security card on top of a sewer gate at 105th Street and Northern Boulevard. He promptly returned the items to Elturkey (Pampena: 573-74). Elturkey described defendant to Pampena as a male black wearing a white T-shirt and black pants and said that he was the

shorter of the two men who had attacked him (Pampena: 577, 579). Pampena took pictures of the iPhone and Elturkey's injuries, returned the iPhone to Elturkey, and then went to the police precinct, where he vouchered the pictures and made copies of the money before returning it to Elturkey (Pampena: 515-16, 525). While driving defendant to the precinct, defendant asked what he was being charged with. Pampena replied "robbery," and defendant stated, "Well, if he say it's his, I guess it's his" (Pampena: 575).

At trial, Pampena identified defendant as the man he arrested who had stolen the property from Elturkey and indicated that, at trial, defendant was wearing glasses and a black button down dress shirt (Pampena: 505). Significantly, the prosecutor asked Pampena if defendant appeared the same as he did on July 3 of 2012. Pampena answered, "No. . . his hair is a little more grown out, he is a little heavier today, and he was clean cut at the time. . . he gained some weight" (Pampena: 506).

The Defendant's Case

ADI GONZALEZ was working as an EMT on the evening of July 3, 2012, when he responded to a call at 105th Street and Northern Boulevard (Gonzalez:613-14). The EMS report was computer generated and then "backed up" by Gonzalez (Gonzalez: 616). Gonzalez handwrote commentary

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about Elturkey and the events that took place that night (Gonzalez: 616, 619). The report indicated that he arrived “on scene” at 9:11 p.m. (Gonzalez: 616). Elturkey refused medical treatment, and Gonzalez could not recall if Elturkey was brought into the ambulance, although he normally would speak with patients inside the ambulance for “street calls,” whether they wanted treatment or not (Gonzalez: 621, 623, 630-31, 639). The EMS report also indicated that Gonzalez observed pain, swelling, and soft tissue injury to Elturkey’s forehead and face, but it did not indicate that Gonzalez observed bleeding from Elturkey (Gonzalez: 624-25).

REQUESTS TO PROCEED *PRO SE* AND FOR A NEW ATTORNEY

At a calendar call in part K-20, on December 16, 2013, defendant asked the court to relieve his appointed attorney (December 16 Proceedings: 3). Defendant claimed that his attorney decided that alleged perjured testimony being used against defendant had no relevance to the case (December 16 Proceedings: 7). The court responded that it had known the quality of defendant’s counsel’s work for many years and that defendant’s interpretation of what counsel had said was probably incorrect. Then the court denied defendant’s application (December 16 Proceedings: 8). Defendant then made an application to proceed *pro se* “because of the fact [that] . . . I prepared my

legal defense for myself thus far” (December 16 Proceedings: 8). The court denied defendant’s application based on the fact that the case was not yet at the trial posture and defendant would be in front of a different judge at trial (December 16 Proceedings: 8) (Hollie, J.).

On January 8, 2014, at the re-opened hearing, defendant made a second oral application to relieve his appointed attorney (January 8 Proceedings: 2). Defendant stated that he did not “feel” that his attorney would properly represent him and that she had been “negligent,” again referencing Pampena’s alleged perjured testimony (January 8 Proceedings: 2). He stated that he addressed this alleged perjured testimony in a motion to dismiss (January 8 Proceedings: 2).³ The court denied defendant’s application, explaining that it had already rejected the same application and that there was no indication that defendant’s attorney was negligent (January 8 Proceedings: 3) (Hollie, J.).

³ In an August 30, 2013, *pro se* Motion to Dismiss the Indictment Pursuant to Section 210.20; 210.35 of the Criminal Procedure Law, defendant argued that Officer Pampena’s grand jury testimony was perjured. Specifically, he alleged that Officer Pampena gave a “ficticiouse [sic] account” of Elturkey’s identification of defendant, based on the fact that the EMS report indicated that Elturkey had refused medical treatment, but Officer Pampena testified that he had conducted the showup procedure with Elturkey while Elturkey was being treated by EMT’s (Defendant’s Motion at 5).

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On January 5, 2015, at a calendar call in part Tap-A, defendant moved to represent himself again (January 5 Proceedings: 3). Defendant explained that he could not go forward with his appointed attorney and that he had previously represented himself at trial on another case (January 5 Proceedings: 3-5). The court asked defendant if he understood that he was charged with a C violent felony and, as a predicate felon, he faced a jail term of from five to fifteen years and five years post-release supervision, if convicted (January 5 Proceedings: 5). The court asked defendant about his education and warned defendant about the dangers of representing himself, as opposed to having his attorney, who had decades of experience as a trial attorney, represent him (January 5 Proceedings: 5-6). Defendant told the court that it was because of his attorney that he had been incarcerated for such a “long extended period of time,” and that he had “seen” her only twice since “last year” (January 5 Proceedings: 7). The court responded that it was aware that defendant’s attorney had had medical issues and that it had tried to move the case forward as quickly as possible. The court asked defendant how he felt about his attorney acting as his adviser at trial, and defendant responded that he would prefer to have a different adviser (January 5 Proceedings: 7). The court concluded that it was unnecessary to replace his attorney as his adviser

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and that it would allow defendant to represent himself (January 5 Proceedings: 8) (Kron, J.). Defendant *never* renewed his application to have his attorney relieved.

On January 20, 2015, before jury selection started at trial, the court asked defendant if he still wanted to represent himself, and defendant responded that he did (January 20 Proceedings: 3). The court then asked defendant several questions about the extent of his education, employment background, understanding of the English language, and whether he was receiving treatment for any mental or physical condition (January 20 Proceedings: 3-4). Defendant stated that he could read, write, speak, and understand the English language, that he was not being treated for any mental or physical conditions, that he was “maybe nine credits” short of his Associate’s Degree, and that he had worked as an “electricians help. . . different things” (January 20 Proceedings: 3-4). Next, the court discussed defendant’s past involvement in the criminal justice system and ascertained that he had been in a courtroom many times before this trial (January 20 Proceedings: 4). The court then asked if anyone had threatened, coerced, or influenced defendant to represent himself against his will . Defendant responded that no one had done so but that, “under the circumstances. . . it’s

hard for a black man to get the proper representation” in the judicial system. He continued, “what is it that it provides for, it really puts us in. . . awkward position [sic]. . . [and that] [s]ometimes we really don’t have a choice in the matter in the case that we want to be represented” (January 20 Proceedings: 4). Next, and critically, the court told defendant that he had a choice: “You can have Miss Povman represent you, that’s your choice” – an attorney whom two other judges had found no good cause to relieve (January 20 Proceedings: 4). Defendant responded that he had explained to another judge that it was his attorney’s “inadequacy” that played a big role in his choice to represent himself but he would “like to go forward. . . at this stage of the proceeding” (January 20 Proceedings: 4-5).

The court then asked defendant about the prior applications to relieve his attorney, and defendant replied that he had explained all of this to Judge Kron over a period of two and one-half to three years and that Judge Kron had denied his application (January 20 Proceedings: 5).⁴ The court then asked defendant if he knew and understood what he was being charged with, what the purpose of that day’s court proceedings were, if he knew what a

⁴ In his brief, defendant does not specify the dates on which he made applications to relieve counsel before Judge Kron. On January 5, 2015, defendant made an application to represent himself, but not to relieve counsel, as discussed above.

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Sandoval hearing was, and what the court's and the jury's functions are January 20(Proceedings: 5-6, 9). Defendant responded that he understood the charges and that he was being charged with second degree robbery and fifth degree possession of stolen property (January 20 Proceedings: 5-6). Defendant also responded that he knew what a *Sandoval* hearing was and that he understood the different functions of the judge and the jury (January 20 Proceedings: 9-10). Defendant then explained that he had once before been permitted to represent himself but that that case had been dismissed before he had an opportunity to select a jury (January 20 Proceedings: 10-12). The court further explained that defendant's attorney had been practicing for many years and had tried hundreds of cases, but that it was defendant's decision how to proceed. The court then confirmed that defendant had discussed this at length with his attorney (January 20 Proceedings: 12). Next, the court asked defendant if he wished to waive the right to be represented, and defendant said, unequivocally, "That's correct, sir" (January 20 Proceedings: 13).

But the court did not stop there. It warned defendant that there was an inherent unfairness to self-representation where defendant was inexperienced because, the court explained, it would hold him to the same legal standards as the prosecutor and his co-defendant's attorney, who were both

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experienced trial attorneys (January 20 Proceedings: 13-16). Only after that colloquy did the court permit defendant to represent himself (January 20 Proceedings: 16) (B. Schwartz, J.). Significantly, even though defendant expressed dissatisfaction with his attorney, he *never* renewed his application to relieve his attorney.

POINT ONE

THE HEARING COURT PROPERLY DENIED DEFENDANT'S MOTION TO SUPPRESS PHYSICAL EVIDENCE, STATEMENTS AND IDENTIFICATION EVIDENCE (Answering Defendant's Brief, Point One).

The hearing court properly denied defendant's suppression motion because Officer Pampera's conduct in stopping, searching, and arresting defendant was proper at every juncture. Defendant nevertheless challenges the hearing court's ruling, claiming that the stop of defendant was not supported by reasonable suspicion and that there was no probable cause to arrest defendant. He claims that, as a result, the statements, search, and identification that followed should have been suppressed. Defendant is wrong. The court properly held that there was probable cause to make an arrest where defendant was seen almost immediately after the officer received a radio run for a robbery in progress, he was only between one and one and a half blocks from the

robbery scene, and he was running away from that location and towards the officer's car. In addition, defendant matched the description given over the radio run, was holding an iPhone, which he spontaneously announced that he had bought from 105th Street and Northern Boulevard – exactly where the robbery had taken place just moments earlier – and where Elturkey identified defendant as one of the robbers and told Officer Pampera that money recovered on defendant was in the exact denominations that had been stolen \from him.

The factual findings of the hearing court, which had the unique opportunity to see and hear the witnesses, are entitled to great deference on appeal. *See People v. McPherson*, 56 N.Y.2d 696, 697 (1982); *People v. Prochilo*, 41 N.Y.2d 759, 761 (1977). This Court will overrule the findings of a hearing court only where they “are manifestly erroneous or so plainly unjustified by the evidence that the interests of justice necessitate their nullification,” and will “refuse to credit testimony which has all appearances of having been patently tailored to nullify constitutional objections.” *People v. Garafolo*, 44 A.D.2d 86, 88 (2d Dept. 1974); *People v. Spann*, 82 A.D.3d 1013, 1014 (2d Dept. 2011); *People v. Miret-Gonzalez*, 159 A.D.2d 647 (2d Dept. 1990); *People v. Africk*, 107 A.D.2d 700, 701-02 (2d Dept. 1985).

Reasonableness is the governing standard in assessing the appropriateness of police conduct in search and seizure cases. *People v. DeBour*, 40 N.Y.2d 210, 218 (1976). To evaluate the appropriateness of police-initiated encounters, the Court of Appeals has devised a four-tier approach. *Id.* at 223. First, the minimal intrusion of approaching and requesting information is permissible when an officer has some objective, credible reason, not necessarily indicative of criminality. Second, the common-law right of inquiry is activated by a founded suspicion that criminality is at hand. Third, when an officer has a reasonable suspicion that a particular individual was involved in a felony or misdemeanor, the officer may forcibly stop and detain that person. C.P.L. § 140.50(1); *People v. Sobotker*, 43 N.Y.2d 559 (1978). Fourth, a police officer may arrest a person when he has probable cause to believe that the individual has committed a crime. *People v. Hollman*, 79 N.Y.2d 181, 184-85 (1992); *People v. DeBour*, 40 N.Y.2d at 223. And a search of defendant is proper where there is reasonable suspicion that defendant is armed or poses a threat to safety. *People v. Caicedo*, 69 A.D.3d 954 (2d Dept. 2010).

A number of factors may support reasonable suspicion in any given case. A defendant's proximity to the crime scene is, of course, an

important factor in determining whether reasonable suspicion exists. *See People v. Turner*, 295 A.D. 2d 545 (2d Dept. 2002); *People v. Vaughan*, 293 A.D. 2d 693 (2d Dept. 2002); *People v. Allen*, 278 A.D. 2d 331 (2d Dept. 2000). Similarly, the fact that a defendant was sweating and breathing hard at the time of detention supports a finding of reasonable suspicion. *See People v. Garcia*, 284 A.D.2d 479 (2d Dept. 2001); *People v. Overby*, 251 A.D.2d 163 (1st Dept. 1998); *People v. McLee*, 249 A.D.2d 995 (4th Dept. 1998). A defendant's apprehension in the direction in which he was alleged to have fled also helps support a subsequent stop. *See People v. Applewhite*, 298 A.D. 2d 136 (1st. Dept. 2002); *People v. Lewis*, 277 A.D. 2d 603 (3rd Dept. 2000); *People v. Kyle*, 254 A.D. 2d 134 (1st Dept. 1998).

People v. Flores, 88 A.D.3d 902 (2d Dept. Oct. 18, 2011), is particularly instructive here. The court found that police officers appropriately stopped and detained defendant briefly for a show-up identification procedure where the officers responded to a radio run of a robbery committed by three male Hispanics, and spoke to the victim, who indicated that the perpetrators had fled in a particular direction. In *Flores*, the defendant and his co-defendant, both Hispanic males, were the only individuals on the street, and were walking in the indicated direction, less than two blocks from the crime

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scene. When an officer identified himself and asked them to stop, they changed directions and walked away at a quicker pace with their heads lowered and their hands raised.

Here, the hearing court properly found that Pampena was justified in stopping and exiting his car and approaching defendant where, almost immediately after receiving the radio run for a robbery *in progress*, he saw defendant running only one or one and a half blocks *away* from the scene of the robbery. In addition, defendant matched the given description of a black male wearing a white shirt and black pants (Decision: 2). Based on those facts, Pampena had an objective, credible reason to approach defendant. At that point, he had not yet “seized” defendant, and thus, no reasonable suspicion was required.

Next, Pampena had both reasonable suspicion to detain defendant and probable cause to arrest defendant. As soon as Pampena, who was in uniform, stepped out of his unmarked car, and before he said anything whatsoever, defendant announced that he bought the iPhone, that he was holding, from 105th Street and Northern Boulevard – the exact location of the robbery in progress about which Pampena had just been notified, and which was less than two blocks from where defendant was running. And defendant

knew that he was announcing that to a police officer, based on the fact that Pampena was in uniform that night, which shows that defendant clearly knew why the police were there and what he had done. Based on all of these facts, Pampena not only had reasonable suspicion to believe that defendant was involved in a crime but he also had probable cause to arrest defendant at this point. *Flores*, 88 A.D.3d at 903. And there was certainly probable cause to arrest defendant once Pampena spoke to Elturkey and once Elturkey identified defendant. *See People v. Hollman*, 79 N.Y.2d 181, 184-85 (1992); *People v. DeBour*, 40 N.Y.2d at 223.

Moreover, the hearing court properly found that Pampena searched defendant incident to a contemporaneous, lawful arrest based on the facts mentioned above (Decision at 2). *See Virginia v. Moore*, 2008 U.S. 3674 (2008); *People v. Gokey*, 60 N.Y.2d 309, 312 (1983). Based on defendant's statement, Pampena had probable cause to believe that defendant was involved in the robbery. He was then justified in handcuffing defendant, searching him, and placing him in his car. And even if defendant was only detained and not yet arrested at that point, Pampena still properly searched him after handcuffing him to ensure he was not armed. *See Caicedo*, 69 A.D.3d at 954.

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Defendant, however, claims that Pampena did not have reasonable suspicion to stop and detain defendant, and that, therefore, the property recovered, identification evidence, and defendant's statements should have been suppressed. Defendant contends that the description of a male black in a white shirt and black pants was not specific enough, on its own, to warrant reasonable suspicion for Pampena to stop defendant. He also claims that defendant running in the vicinity of the crime scene did not warrant seizure of the defendant, and neither did the fact that defendant was holding an iPhone because the radio run did not indicate that an iPhone had been stolen. Defendant also argues that defendant's first statement was not spontaneous because it was the result of an unlawful seizure. Defendant's claims lack merit.

As fully discussed above, Pampena did not need reasonable suspicion to get out of his car and approach defendant. At that point he had the right to approach defendant and make an inquiry based on all of the facts enumerated above. And Pampena did not block defendant's path by stopping his car and certainly did not seize defendant at that point. Pampena testified that he stopped and got out of his car as soon as he saw defendant, but he never testified that he blocked defendant's path when he stopped his car or in any

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other manner. This does not amount to a seizure, especially where defendant was on foot and simply could have run around Pampena's car or turned around and run the other way. Therefore, because Pampena had not yet detained defendant at that point, reasonable suspicion was not required. But no sooner had Pampena gotten out of his car than defendant stated that he bought the iPhone, that was in his hand, from 105th Street and Northern Boulevard – the scene of the robbery that had *just* taken place. And defendant's statement was an unprovoked, spontaneous, and completely voluntary statement that did not occur as the result of any detention or seizure. Indeed, Pampena had not even spoken to defendant.

Defendant claims that the phone in his hand had no bearing on the court's analysis because the radio run did not indicate that an iPhone had been stolen. This is not so. A robbery necessarily implies that property was taken. So when Pampena saw defendant running with an iPhone in his hand, *combined with* all of the other factors, that certainly added to the reasonable suspicion that defendant was involved in the reported robbery.

Similarly unpersuasive is defendant's argument that the description given over the radio – a male black in a white shirt and black pants – was too general to constitute reasonable suspicion. Although that description

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on its own may not have amounted to reasonable suspicion, that was decidedly not the *only* factor Pampena had to consider. Defendant not only matched that description but was also seen running less than two blocks away from the where the robbery had just occurred, was holding an iPhone, *and* admitted that he had just come from the scene of the robbery. All of these factors taken together amount to reasonable suspicion to detain defendant and probable cause to arrest him. *See Hollman*, 79 N.Y.2d at 184-85; *People v. DeBour*, 40 N.Y.2d at 223; *Flores*, 88 A.D.3d at 903.

In sum, the hearing court properly denied defendant's suppression motion when it held that Officer Pampena had both reasonable suspicion to detain defendant and probable cause to arrest him.

POINT TWO

OFFICER PAMPENA PROPERLY TESTIFIED THAT THE VICTIM IDENTIFIED DEFENDANT IN A SHOWUP, AND DEFENDANT'S CLAIM TO THE CONTRARY IS MERITLESS AND UNPRESERVED (Answering Defendant's Brief, Point Two).

The People laid the proper foundation to admit Officer Pampena's testimony about Elturkey's prior showup identification of defendant, as Elturkey testified that he had no recollection of the incident and had trouble remembering the co-defendant's face due to the passage of time.. Defendant,

however, claims that the People did not lay the proper foundation because Elturkey's testimony did not establish that he had no present recollection of defendant. Defendant is wrong. Furthermore, his claim is unpreserved because he objected to Officer Pampera's testimony about the showup after both sides had rested *and* after the court denied his motion for a trial order of dismissal. In any event, the People satisfied the requirements to admit the testimony under section 60.25 of the Criminal Procedure Law; including the last requirement, that the reason Elturkey was unable to identify defendant at trial was due to a lack of memory. In the alternative, any error was harmless due to the overwhelming evidence of defendant's guilt.

The Court of Appeals explained that C.P.L. § 60.25 was enacted by the Legislature for a situation where a "witness, due to lapse of time or change in appearance of the Defendant, cannot make an in-court identification, but has on a previous occasion identified the defendant." *People v. Nival*, 33 N.Y.2d 391, 395 (1974). The statute explicitly overrules the prohibition on hearsay identification testimony adopted by *People v. Trowbridge*, 305 N.Y. 471 (1953) "by permitting the fact of the prior identification to be established by the testimony of another person when the identifying witness is unable to make an identification at trial." *People v. Lagana*, 36 N.Y.2d 71, 74 (1975).

Section 60.25 allows a third party, usually a police officer who witnessed the identification, to testify to the witness's identification of the defendant. C.P.L. § 60.25(1)(b). Under these circumstances, "once the witness has testified to a previous identification of the culprit, the fact that the defendant is the person whom the witness previously identified 'may be established by testimony of another person or persons to whom the witness promptly declared his recognition' at the time he made the prior identification." *Nival*, 33 N.Y.2d at 395.

In order to properly admit third party testimony about a past identification, the People must establish three elements: Defendant concedes that the People adequately established the first two elements, that Elturkey observed defendant during the robbery and that Elturkey identified defendant in a showup procedure as the person who robbed him. *See* C.P.L. § 60.25(1)(a)(i),(ii) (*See* Defendant's Brief at 23). The third element requires the People to demonstrate that the witness's inability to identify the defendant at trial is based upon a lack of present recollection due to the passage of time. C.P.L. § 60.25(1)(a)(iii). The People's evidence here amply made that showing, contrary to defendant's claim.

At the outset, defendant's current claim is unpreserved. Where a defendant makes a general objection that does not address the specific requirements of § 60.25 that he challenges on appeal, he fails to preserve his contention for review. This Court has repeatedly held that in order to preserve a claim that third-party identification testimony was admitted without the proper foundation required by § 60.25, a defendant must make that specific argument at trial. *People v. Jenkins*, 205 A.D.2d 642, 643 (2d Dept. 1994), *lv denied* 84 N.Y.2d 868; *see also People v. Davis*, 139 A.D.3d 966 (2d Dept. 2016); *People v. Giles*, 242 A.D.2d 958, 959 (2d Dept. 1997)(unpreserved where defendant failed to object to admission of testimony from two officers concerning prior identification of defendant by complainant).

Here, after Elturkey did not identify defendant at trial, the People elicited testimony from Pampera regarding Elturkey's prior identification of defendant. Defendant never objected to Pampera's testimony during the challenged testimony (Proceedings: 513-14). Instead, defendant waited to object until *after* the People rested and after the court denied his motion for a trial order of dismissal (Proceedings: 357). Even then, the sum total of defendant's untimely objection to the challenged testimony was that "we not allow that to be presented to the jury. . . because it doesn't apply to us in this

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case” (Proceedings: 598). The court ruled that defendant’s objection was untimely and, in any event, the People laid the proper foundation for the admission of Pampena’s testimony (Proceedings: 598). Defendant made no further comment.

Not only was defendant’s application untimely, but it was also only a vague general objection. He failed to specify which requirement of § 60.25 the People failed to establish and did not reference the statutory bases for his objection. Therefore, his current claim that the People failed to meet the foundational requirements necessary under C.P.L. § 60.25 is unpreserved.⁵

Nor should this Court review defendant’s unpreserved claim in the interest of justice, as the People satisfied the third prong required by section 60.25 in order to lay the foundation for Pampena to testify about Elturkey’s prior identification of defendant. The People met that prong by demonstrating that Elturkey’s inability to identify defendant in court was due to a lack of present recollection after a passage of two and a half years. *See* C.P.L. § 60.25(1)(a)(iii).

⁵ Defendant, in his brief, concedes as much, and claims that “this Court should nevertheless consider the error in the interest of justice” (Defendant’s Brief: 24-25).

In order to meet this third prong of section 60.25, the People must resent testimony that establishes a lack of present recollection of the defendant as the perpetrator. *People v. Quevas*, 81 N.Y.2d 41, 45 (1993). A “lack of present recollection” means that the witness is unable to make the identification at trial due to the passage of time.” *People v. Johnson*, 75 N.Y.2d 856 (1990); *People v. Bayron*, 66 N.Y.2d 77, 81 (1985). The statute is also satisfied when a witness’s inability to recall results from a change in the defendant’s appearance. *People v. Cwikla*, 46 N.Y.2d 434, 444-45 (1979); see also *People v. Robinson*, 39 A.D.3d 772, 772 (2d Dept. 2007); *People v. Marrero*, 183 A.D.2d 728, 729 (2d Dept. 1992); *People v. Hernandez*, 154 A.D.2d 197, 201 (2d Dept. 1990). But courts have declined to extend the statute to a witness who does not identify the defendant in court for other reasons, such as a fear of reprisal (*Bayron*, 66 N.Y.2d at 81) or a witness’s inability to identify the defendant because he is physically or mentally incapable of doing so (*Quevas*, 81 N.Y.2d at 45-46). Significantly, “the basic decision as to whether a witness lacks sufficient recollection to make an in-court identification remains a matter for the trial court’s discretion” and “resolution of this question turns upon an evaluation of the totality of evidence presented.” *Hernandez*, 154 A.D.2d at 201 (internal citations omitted).

The facts of this case resemble those in *People v. Hernandez*, where this Court concluded that the witness's memory was impaired by the passage of time and that the People properly introduced third party identification testimony pursuant to section 60.25. In *Hernandez*, the witness testified that he did not see defendant in the court room, as Elturkey did here. In *Hernandez*, the witness never testified that he did not remember what the defendant looked like, like Elturkey here. Despite that, this Court held in *Hernandez* that the witness's testimony was sufficiently indicative of a lack of present memory where he was asked to make in-court identification one year after the incident and where the defendant's appearance had changed in terms of his weight and hair length. This Court held that a lapse of time and change in appearance of the defendant since the prior identification are "critical factors in determining whether to admit testimony under section 60.25." *Id.* at 201 (internal citations omitted). "Reliance on these factors is especially warranted where the cause of a witness's inability to make a trial identification is unexplained or the testimony which bears upon this issue is vague, nonparticularized, and conclusory in content." *Id.*

Here, although Elturkey stated that he did not see defendant in the courtroom, his inability to make a trial identification was never explained

beyond that simple answer. Therefore, like in *Hernandez*, it is crucial to examine critical factors such as how much time elapsed between the prior identification and the trial, and the change in defendant's appearance. See *Hernandez*, 154 A.D.2d at 201. Here, there was evidence that Elturkey was having trouble remembering the identity of his attackers. He testified more than once that he was having trouble remembering co-defendant. He also stated that, "I'm a person like I don't know if I see the person twenty times, I don't know what he was wearing. I mean like I always look for basic things, *but I'm not remember faces* or [sic]" (Elturkey: 353) (emphasis added). And his testimony took place two and a half years *after* Elturkey identified defendant on the night of the robbery. Elturkey also testified that defendant was homeless at the time of the robbery and that he had encountered him only three or four times over the course of only one to one and one half months.

And when the prosecutor asked Pampera if defendant looked the same at trial as he did the day of the robbery, Pampera unequivocally said "no" (Pampera: 506). He testified that defendant had gained weight, that his hair was a bit longer, and that he was clean cut at the time of the robbery. Pampera also testified that defendant was wearing a black button down dress shirt and glasses, and Lanning testified that he was wearing a black jacket – as opposed

to the white T-shirt and black pants that he was wearing on the night of the robbery. Thus, here, like in *Hernandez*, much time had passed since the witness had identified defendant at the crime scene, and defendant's hair and weight had changed. *See Hernandez*, 154 A.D.2d at 201.

But the facts here are even stronger than those in *Hernandez*. Here, in addition to the change in defendant's hair and weight, even more time had passed than in *Hernandez*. And here, defendant went from appearing homeless on the night of the robbery to being dressed in a suit and glasses at trial. Clearly, defendant's appearance at the time of the robbery was quite different than his appearance two and a half years later at trial. Such a drastic change in appearance undoubtedly affected Elturkey's memory when he testified – more than once – that he was having trouble remembering. Thus, Elturkey's inability to identify defendant was clearly impaired by the passage of two and a half years and the dramatically changed appearance of defendant. *Id.* Furthermore, after defendant lodged an untimely objection to Officer Pampera's testimony, the trial court explicitly found that the proper foundation for the testimony had been laid. Critically, "a determination by a trial court that a witness does not possess sufficient present recollection to permit an in-court identification of the defendant *must be accorded the same effect* as a

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statement by the witness that he cannot now identify the defendant.” *Hernandez*, 154 A.D.2d at 200 (citing *Cwikla*, 46 N.Y.2d 434, 444) (emphasis in original); *see also People v. Mitchell*, 143 A.D.2d 421 (2d Dept. 1988); *People v. Black*, 130 A.D.2d 353 (1st Dept. 1987). And the trial court’s determination should be given deference here. As stated above, the record fully supports the trial court’s determination that the People properly elicited C.P.L. § 60.25 testimony. No other reason, such as refusal or fear, is borne out by the record. Thus, contrary to defendant’s claim, the final statutory requirement was met, and the trial court’s decision regarding the challenged testimony should not now be disturbed.

Even if this Court finds that a proper foundation was not laid, any error in admitting the testimony was harmless, as the other evidence at trial overwhelmingly established defendant’s guilt. *Trowbridge* errors are harmless where other evidence of a defendant’s guilt is overwhelming and there is no significant probability of a different verdict. *People v. Crimmins*, 36 N.Y.2d 230 (1975); *see also People v. Rodriguez*, 139 A.D.3d 883 (2d Dept. 2016) (any improper bolstering would have been harmless error due to overwhelming guilt); *People v. German*, 45 A.D.3d 861 (2d Dept. 2007) (improper bolstering was harmless error because evidence of guilt was overwhelming where

defendant was apprehended shortly after robbery and found in possession of both exact sum of cash taken from victim and toy gun that matched description of gun used during robbery); *People v. Marrero*, 183 A.D.2d 728 (2d Dept. 1992)(evidence of guilt overwhelming, including defendant's inculpatory statement).

People v. Jenkins, 205 A.D.2d at 642, is strikingly similar to the facts here. In *Jenkins*, police officers conducted a showup with the victim shortly after a robbery. The trial court permitted a police officer to testify about the victim's prior identification of defendant, a ruling that the defendant later disputed on appeal. This Court held that the defendant's *Trowbridge* claim was unpreserved but that, in any event, any error was harmless because there was other overwhelming evidence of defendant's guilt. *Id.* at 643. In *Jenkins*, that evidence was the fact that the defendant was apprehended soon after he got out of the getaway car and that he possessed some of the proceeds of the robbery when he was apprehended. *Id.*

Here, too, there is overwhelming evidence of defendant's guilt other than the prior identification of defendant. Similar to *Jenkins*, defendant here was apprehended within minutes of the robbery, and he possessed Elturkey's stolen property when he was apprehended. Here, however, there

was even more evidence of his guilt than in *Jenkins*. Not only was defendant apprehended shortly after the robbery, but he was also apprehended only one block away from the robbery and was running away from the scene of the robbery at the time. And without prompting, defendant admitted that he bought the phone from 105th Street and Northern Boulevard – the precise location of the robbery. Moreover, here, defendant also matched the description of the robber that was given in the radio run. Furthermore, he had cash in the *exact* same amount and denominations that was stolen from Elturkey. Still further, defendant did not dispute that the property found on him belonged to Elturkey, and instead, he stated, “If he said it’s his, it must be his.” (Pampena: 33); *see Marrero*, 183 A.D.2d at 728. Therefore, any *Trowbridge* error was harmless because there was other overwhelming evidence of defendant’s guilt.

In sum, defendant failed to preserve his claim that the People did not lay a proper foundation to admit the challenged testimony because he did not properly object to the People’s questioning of Officer Pampena in a timely and specific manner, and moreover, the People laid the proper foundation to admit this testimony. In any event, any error was harmless.

POINT THREE**DEFENDANT'S WAIVER OF HIS RIGHT TO
COUNSEL WAS UNEQUIVOCAL, KNOWING,
INTELLIGENT, AND VOLUNTARY
(Answering Defendant's Brief, Point Three).**

Defendant intelligently and voluntarily waived his right to counsel when he unequivocally stated that he was prepared to represent himself. Nevertheless, defendant contends that his request to proceed *pro se* was not unequivocal because he made the request only after the court refused to give him a new attorney. Defendant also argues that his waiver was not voluntary, intelligent, and knowing. Defendant's claims lacks merit and are belied by the record. Although defendant had, in the past, requested that his appointed counsel be relieved, he did not renew that application before trial, when he also asked to proceed *pro se* and made clear to the court that he was ready to proceed to trial *pro se*. He answered all of the court's questions and continued to state, unequivocally, that he wanted to represent himself. And his application to represent himself was not a spur of the moment request – his applications to do so dated as far back as two years before trial.

It is well settled that a defendant has a state and federal constitutional right to forego counsel and represent himself. *Faretta v. California*, 422 U.S. 806 (1975); *People v. McIntyre*, 36 N.Y.2d 10 (1974).

And to prevent convicted defendants from perverting the system by subsequently claiming a denial of their right to proceed *pro se*, the request for self-representation must be unequivocal. *Faretta v. California*, 422 U.S. at 835; *People v. LaValle*, 3 N.Y.3d 88, 106 (2004); *McIntyre*, 36 N.Y.2d at 17. To be unequivocal, a request to proceed *pro se* must be “clearly and unconditionally presented to the trial court.” *McIntyre*, 36 N.Y.2d at 17. Moreover, if the request for self-representation goes unanswered or is denied, and the defendant subsequently acts in a manner that indicates his satisfaction with counsel, he has abandoned the request. *People v. Gillian*, 8 N.Y.3d 85 (2006); *People v. Diaz*, 83 A.D.3d 958 (2d Dept. 2011); *People v. Scivolette*, 40 A.D.3d 887 (2d Dept. 2007). After an unequivocal request to proceed *pro se*, the court should conduct a searching inquiry to determining whether the defendant is waiving his right to counsel knowingly, voluntarily, and intelligently. *People v. Arroyo*, 98 N.Y.2d 101(2002); *People v. Smith*, 92 N.Y.2d 516 (1998).

The application is not unequivocal, however, if it appears to be made in frustration with the court’s refusal to assign new counsel. *See Gillian*, 8 N.Y.2d at 85; *see also People v. Payton*, 45 N.Y.2d 300, 315 (1978); *People v. Littlejohn*, 92 A.D.3d 898 (2d Dept. 2012); *People v. Carter*, 299 A.D.2d

418 (2d Dept. 2002); *People v. Rainey*, 240 A.D.2d 682 (2d Dept. 1997). In *People v. LaValle*, 3 N.Y.2d 88, 106-07 (2004), the Court held that the defendant did not make a sufficient unequivocal request to proceed *pro se*. In *LaValle*, the defendant voiced extreme dissatisfaction with his attorneys, stating that he would have to proceed *pro se* only if he did not get a new attorney and that he regarded self-representation as his last option. Because defendant raised the request to proceed *pro se* only as part of a greater plan to obtain new counsel, his request was not unequivocal and, therefore, the trial court did not have to allow him to proceed *pro se*.

By contrast, here, defendant's waiver of the right to counsel was voluntary, intelligent, and knowing, and his request to represent himself was unequivocal where he requested to represent himself on numerous occasions, in front of three different judges, and where he did not request new counsel during his last two applications to represent himself, which were granted.

Defendant made applications for new counsel twice in front of the same court, on December 16, 2013, and again several months later, on May 20, 2013. Those applications were both denied. Defendant requested new counsel because, according to him, his appointed attorney was negligent, would not represent him properly, and did not believe that Officer Pampena's purportedly

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perjured testimony about stolen property being recovered from defendant was relevant to his case. The court denied defendant's first request because the case was not yet in a trial posture. It denied the second request because it determined that counsel had not been negligent and that defendant was most likely incorrectly interpreting what she had told him regarding purportedly perjured testimony being irrelevant to his case. Furthermore, immediately after his first request for new counsel was denied on December 16, 2013, defendant followed up that application with an application to represent himself. Defendant made this request to proceed *pro se*, not because his attorney was not relieved, but because, as defendant clearly explained to the court, he had already "prepared [his] legal defense" (December 16 Proceedings: 8). And the second time defendant asked to have counsel relieved, he did not follow that application with a request to represent himself.

Then, on January 5, 2015, in front of a different court, defendant again requested to go *pro se*, indicating that he could not go forward with his attorney. Defendant stated that he had only seen his attorney twice that year. The court stated that it was aware of his attorney's medical issues, explained that defendant's attorney had many years of trial experience, and warned defendant of the dangers of representing himself. But even though defendant

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expressed dissatisfaction with his attorney, he did not actually ask for his attorney to be replaced on this date. He did not state that, *if* he could not get a new attorney *then* he wanted to represent himself, unlike the defendant in *LaValle*. *LaValle*, 3 N.Y.2d at 106-07 .

Next, just before trial commenced on January 20, 2015, Judge Barry Schwartz – yet another court – confirmed that defendant still wanted to represent himself. Although, during the colloquy with this court, defendant stated that it was his attorney’s “inadequacy” that played a “big role” in his choice to represent himself, he did not request new counsel and instead unambiguously stated that he wanted to proceed to trial (Proceedings: 4-5). Once again, and consistent with his prior requests to proceed *pro se*, defendant *did* not state that he would represent himself only *if* the court did not replace his attorney. Critically, he never requested a new attorney on this date. And when defendant stated that he did not have a choice in the matter because of his attorney, the court informed him that, to the contrary, he *did* have a choice and then told him that he could go forward with his appointed attorney, whom no court had found reason to relieve. In fact, all three courts cited defense counsel’s wealth of trial experience, noting that she had tried hundreds of cases over a period of decades.

Defendant's request was unequivocal where, on January 5, 2015, and January 20, 2015, defendant requested to proceed *pro se* but did not renew his request to relieve counsel. On both dates, he answered a number of questions from the court and he staunchly repeated his desire to represent himself. And the decision to represent himself was not a spur of the moment decision on the eve of trial. Far from that, defendant had request to represent himself as far back as December 16, 2013, and his reasoning was that he had prepared his own legal defense.

Nonetheless, defendant claims that he requested to proceed *pro se* only because the court refused to assign new counsel. Defendant's claim lacks merit and is belied by the record. As an initial matter, defendant is not entitled to the attorney of his choosing.

Although an indigent defendant has a right to a court-appointed attorney, he or she does not have the right to choose assigned counsel. The decision to appoint new counsel is within the trial court's discretion upon a showing of good cause. . . . Here, the defendant's conclusory statements that he lacked confidence in his attorney, and his general expression of dissatisfaction with counsel, were insufficient to establish a good cause for a substitution of counsel.

People v. White, 60 A.D.3d 877, 875 (2d Dept. 2009)(internal citations omitted). *See also People v. Sawyer*, 57 N.Y.2d 12, 18-19 (1982)(indigent

defendant guaranteed right to counsel but not right to choice of assigned counsel).

Here, the trial court's decision not to relieve counsel was a proper exercise of its discretion, as defendant failed to show good cause relieve her. On two different occasions in 2013, the court did not find counsel to be negligent or inadequate in any way, and also did not find that there was good cause to relieve her. Nor did defendant offer any. Defendant unequivocally stated that he wanted to represent himself, demonstrated by him saying that he wanted to proceed with the matter. And the court told defendant that he had an alternative to self-representation: that appointed counsel would represent him. And after each court concluded its litany of questions, defendant unequivocally stated that he wanted to proceed *pro se*, as he said that he wanted to "go forward though at this stage of the proceeding" (Proceedings: 5).

Furthermore, although defendant expressed dissatisfaction with his attorney on January 5, 2015, and January 20, 2015 – the dates that he asked to represent himself without also asking for counsel to be relieved – he never actually explained why he disliked his attorney and, more importantly, never renewed his application to relieve counsel. And the fact that, on prior

occasions, he had requested new counsel did not undermine the unequivocal and independent nature of his request to represent himself, as by the time that the trial was about to start, defendant had abandoned his request for new counsel because the only requests he made were to represent himself. Clearly, a court cannot deny or grant an application that has not been made.

The record shows that defendant had already made up his mind on January 20, 2015, the date of trial, that he wanted to represent himself, indicated by him telling the court that, “I would like to go forward though at this stage of the proceeding.” (Proceedings: 5). In addition, and critically, defendant informed the court, almost bragging, that he had represented himself in a prior case – further proof that his decision to proceed *pro se* here was one that he had made before and that he intended to make here, independent of his request for a new attorney. Therefore, because defendant did not renew his application to relieve counsel and because he stated that he absolutely wanted to proceed to trial *pro se*, his request was unequivocal. *See People v. Jackson*, 97 A.D.3d 693, 694 (2d Dept. 2012)(defendant abandoned his request to proceed *pro se* where he acted in manner indicating his satisfaction with counsel).

Defendant's request was also knowing, voluntary, and intelligent where two different courts asked him a series of questions designed to confirm his intent and capacity to make the decision to proceed *pro se*. Defendant was also warned by the court on January 5, 2015, that he was charged with a class "C" violent felony and was facing between five and fifteen years in jail because of his predicate felon status. The trial court on January 20, 2015, further warned defendant that, as a *pro se* litigant, he was at a disadvantage and that he would be held to the same legal standard as the other attorneys. Defendant, however, claims that defendant's request was not knowing, voluntary, and intelligent because the trial court did not fully inform him of the hardships he would face or the fundamental rights he would be waiving, and it did not impress upon him the seriousness of the charges against him or advise him of the punishment he was facing. Defendant's claim is belied by the record. As is fully discussed above, the court did apprise him of all of those facts on January 5, 2015, and did fully warn him of the disadvantages he faced on January 20, 2015.

In sum, defendant's request to represent himself was unequivocal where he abandoned his request for a new attorney and his waiver of the right to counsel was knowing, voluntary, and intelligent where two different judges

informed him of the consequences he faced, if convicted, and the disadvantages and hardships he faced in representing himself.

POINT FOUR

**DEFENDANT'S SENTENCE WAS NEITHER
EXCESSIVE NOR UNDULY HARSH, AND
SHOULD NOT BE DISTURBED ON APPEAL
(Answering Defendant's Brief, Point Four).**

Given the severity of defendant's crime, his status as a predicate felon, and his lengthy criminal record, the sentencing court properly exercised its discretion in imposing two ten-year prison sentences for two counts of second degree robbery, to run concurrently, and two one-year prison sentences for third degree assault and fifth degree possession of stolen property, to merge with his other sentences. The sentence was entirely legal and also warranted. Nevertheless, defendant contends that the court should have imposed a reduced sentence – although he does not propose a sentence – because he did not initiate the attack on the victim, was less culpable than his co-defendant, and conducted himself in a courteous and respectful manner while representing himself at trial, showing that he is an intelligent and respectful man. Defendant is wrong.

Although sentencing is primarily a function of the trial court, *People v. Felix*, 58 N.Y.2d 156, 161 (1983), this Court may modify the

sentence “as a matter of discretion in the interest of justice.” C.P.L. § 470.15(3). In order to exercise this power, however, the Court must determine not only that the sentence imposed was harsh and excessive, but also that there is some demonstrated “need to impose a different view of discretion than that of the sentencing Judge.” *People v. Suitte*, 90 A.D.2d 80, 86 (2d Dept. 1982). Such a need will generally arise only if, pursuant to the statutory mandate that governs invocation of this Court’s interest of justice jurisdiction, the sentence imposed was “unduly” harsh and excessive. C.P.L. § 470.15(6)(b); *People v. Thompson*, 60 N.Y.2d 513, 519 (1983). Courts consider the facts and circumstances of the case when judging whether a sentencing court abused its discretion in sentencing the defendant. *See, e.g., People v. Sabin*, 73 A.D.3d 1390 (where defendant rubbed seven-year-old girl’s vagina underneath her clothing while babysitting her, no abuse of discretion in sentencing defendant to seven years prison for first degree sexual abuse given nature of crime, age of victim, and exploitation of family’s trust). Here, defendant’s sentence was not harsh and excessive — and certainly was not “unduly” so — and there is thus no need for this Court to substitute its discretion for that of the court below.

A review of the record reveals that defendant's sentence was a proper exercise of the court's discretion. During sentencing, the court considered the Probation Department's Pre-Sentence Report and listened to oral arguments by the People and defendant, in which he maintained his innocence – clearly showing no remorse at all (S: 21).

The People asked the court to impose the maximum allowable sentence: a sentence of fifteen years for second degree robbery, based on the serious nature of the crime and the defendant's lengthy criminal record of both felony and misdemeanor convictions, including a burglary conviction in which he broke into a store late at night and stole property, and a coercion conviction in which he lured a woman inside an abandoned building for the purpose of committing a sexual assault (S: 20).

Defendant did not propose a sentence, but did argue that the People never presented any evidence that defendant was caught with the victim's stolen property and that any testimony to the contrary was perjured (S: 21). Defendant also argued that he is not the violent criminal that the People made him out to be and that his criminal history consists of mainly non-violent crimes, such as drug possession convictions and other "minor offenses," such

as trespassing (S: 21-22). Finally, defendant argued that he suffers from a drug problem (S: 22)

The Probation Department's Pre-Sentence Report strongly recommended incarceration due to the nature of the offense and defendant's lengthy criminal history, that dates back to 1985 and consists of twenty-two misdemeanor and two felony convictions, including assault, robbery, and burglary, as well as one probation revocation (PSR: 3-4). In the "Victim's Impact Statement" portion of the report, Elturkey indicated that he had experienced "flash backs" and, as a result of the attack, was generally fearful (PSR: 3). Defendant denied his guilt in his interview (PSR: 3).

In light of these facts, the court properly exercised its discretion in sentencing defendant to ten years of incarceration. Defendant was convicted of two counts of Robbery in the Second Degree, a class C felony, which carries a maximum sentence of fifteen years. P.L. § 70.00(2)(c). Indeed, the imposed ten-year sentence was below the fifteen-year sentence that the People recommended. Thus, despite the length of defendant's sentence, his sentence was fair and below the maximum permitted sentence for his crime.

The factors considered by the court also support the sentence. The court recognized the seriousness of the crime and the callousness of

defendants' actions in which they "had no problem hurting the victim in order to take his money" (S: 22). Critically, the court noted that both defendants were "equally responsible and involved" in the crime where it appeared that they had intentionally targeted the victim (S: 23). The court also noted that the victim's failure to identify defendant during the trial did not change his "belief in the accuracy and justice of the jury's verdict" (S: 23).

The factors offered by defendant as a basis for a lesser sentence do not constitute "extraordinary circumstances" that warrant interference by this Court with the discretion of the lower court, and a substitution of this Court's discretion in the interest of justice. *See, e.g., People v. Sims*, 57 A.D.3d 1106 (3rd Dept. 2008) (ten-year sentence for second degree robbery not unduly harsh or excessive, despite defendant's age of seventeen, failed education, and lack of violent criminal history); *People v. Frary*, 29 A.D.3d 1223, 1226 (3d Dept. 2006) (where defendant was convicted of first degree course of sexual conduct against a child, his lack of criminal record and fact that he was contributing member of community were not extraordinary circumstances given nature of crime and young age of victim); *People v. Roman*, 84 A.D.2d 851 (2d Dept. 1981). The trial judge, who saw and heard all of the witnesses testify and saw the physical evidence, properly exercised his discretionary

power to sentence. *See People v. Farrar*, 52 N.Y.2d 305 (1981); *Suitte*, 90 A.D.2d at 86.

Indeed, defendant's crimes here were extremely serious. Defendant and his co-defendant targeted and ganged up on a fifty-two year old man and beat him to the point where he lost a tooth and had multiple head lacerations, and a swollen, black-and-blue eye. They launched a coordinated attack on the victim, where defendant pinned Elturkey down while co-defendant slammed his head against the curb and punched him, incapacitating him so defendant could reach into his pockets and steal his iPhone and wallet – which is precisely what defendant did.

Defendant seeks leniency on the grounds that he did not initiate the attack on the victim, and was, according to defendant, less culpable than his co-defendant, and that he conducted himself in a courteous and respectful manner while representing himself at trial, showing, according to him, that he is an intelligent and respectful man. But the sentencing court was well aware of those factors when it sentenced defendant, and they are deserving of no additional weight on appeal. And these are not extraordinary circumstances that would warrant a reduction in sentence given the nature of the offense, the injuries that the victim sustained, and defendant's lengthy criminal record. *See*

People v. Sabin, 73 A.D.3d 1390, 1391 (3d Dept. 2010); *Sims*, 57 A.D.3d 1106; *Frary*, 29 A.D.3d at 1226.

Defendant's sentence was entirely legal, and the decision of the sentencing court reflects its consideration of the specific factors in this case, including the severity of the crime and defendant's lengthy criminal record, including a burglary conviction in which he stole property, which was his most recent conviction before this one. Therefore, the sentence imposed should be given deference by this Court and left undisturbed.

In sum, because the imposed sentence was within the statutory guidelines and defendant does not establish extraordinary circumstances, his sentence is not excessive. Therefore, defendant's judgment of conviction should be affirmed.

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CONCLUSION

For the reasons set forth above, defendant's judgment of conviction should be affirmed.

Respectfully submitted,

RICHARD A. BROWN
District Attorney
Queens County

JOHN M. CASTELLANO
JOHNNETTE TRAILL
RONI PIPLANI
MEREDITH D'ANGELO
Assistant District Attorneys
of Counsel

October 14, 2016

SR104

CERTIFICATE OF COMPLIANCE

I certify the following in compliance with section 670.10.3 of the Rules of this Court:

1. The foregoing brief was prepared on a computer.
2. The typeface used is Times New Roman.
3. The point size of the text is 14 point, except for footnotes, which are 12 point.
4. The brief is double spaced, except for the Table of Contents, point headings, footnotes, and block quotes.
5. The brief contains 12,767 words, exclusive of the Table of Contents, proof of service, and the certificate of compliance, based on the word count of the word-processing system used to prepare this brief.

Dated: Kew Gardens, New York
October 14, 2016

A handwritten signature in black ink, appearing to read 'N. Q. [unclear]', written over a horizontal line.

Assistant District Attorney

SR105

Amuel Pipkeni

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION SECOND DEPARTMENT

6/30/19

THE PEOPLE OF THE STATE OF NEW YORK
RESPONDENT

- AGAINST -

A.D. NO 2015-01907

IND. NO 2228/2012

QUEENS COUNTY

RAYMOND BALL,

DEFENDANT-APPELLANT

SUPPLEMENTAL BRIEF

FOR DEFENDANT-APPELLANT

RAYMOND BALL

Raymond Ball, 15A1060
Mid-State Correctional Facility
P.O. Box 2500
Marcy, NY 13403

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SR106

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION; SECOND DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK

RESPONDENT,

- AGAINST -

RAYMOND BAL,

DEFENDANT-APPELLANT

Preliminary Statement

THIS IS A SUPPLEMENTAL BRIEF FROM A JUDGMENT
 RENDERED MARCH 4, 2015, BY THE SUPREME COURT, QUEEN
 COUNTY, CONVICTING APPELLANT OF REVAL LAW 160.10(1)
 AND REVAL LAW 160.10(2)(A) ASSAULT IN THE THIRD
 DEGREE IN VIOLATION OF REVAL LAW 120.00(1) AND
 CRIMINAL POSSESSION OF STOLEN PROPERTY IN THE
 FIFTH DEGREE IN VIOLATION OF REVAL LAW 165.40 AND
 SENTENCING HIM TO CONCURRENT DETERMINATE
 TERMS OF EMPRISONMENT OF 10 YEARS FOR THE
 ROBBERY/COUNTS AND DEFINITE TERMS OF IMPRI-
 SONMENT OF ONE YEAR FOR THE ASSAULT AND
 STOLEN PROPERTY COUNT (BARRY A SCHWARTZ, J, AT
 TRICAL AND SENTENCING).

STATEMENT OF FACTS
THE SUPPRESSION HEARING

P.O. DANIEL LANNING ASSIGNED TO THE 115TH PCT WAS IN PLAIN CLOTHES ON PATROLE IN AN UNMARKED VEHICLE ON THE NIGHT OF JULY 3, 2012 AT ABOUT 9:00 P.M. HE RECEIVED A RADIO CALL OF A MALE BEING ROBBED AT KNIFE POINT ON THE CORNER OF 105 STREET AND NORTHERN BOULEVARD BY THREE BLACK MALES, ONE OF WHOM WAS WEARING A WHITE SHIRT AND BLACK PANTS. WHEN P.O. LANNING PROCEEDED TO THAT LOCATION HE OBSERVED A MAN NAMED E TURKEY WHO WAS BLEEDING FROM HIS HEAD AND MOUTH AND LOOKED AS IF HE HAD BEEN BEATEN UP. E TURKEY TOLD P.O. LANNING THAT "HE HAD BEEN ROBBED AND THEY WERE GONE" (TRC 373 - TRC 374)

NUMERICAL REFERENCES PRECEDED BY "AB" ARE TO THE MINUTES OF THE SUPPRESSION HEARING CONDUCTED ON MAY 21, 2013. THOSE PRECEDED BY "BA" ARE TO THE MINUTES OF THE REOPENED SUPPRESSION HEARING CONDUCTED ON JANUARY 8, 2014. THOSE PRECEDED BY "TRC" ARE TO THE MINUTE OF THE TRIAL. THOSE PRECEDED BY "S" ARE TO THE MINUTES OF SENTENCING. THOSE PRECEDED BY "NMA" ARE TO THOSE MINUTES NOT MADE AVAILABLE ^{AFTER} BY COURT ORDER OF APPELLATE DIVISION SECOND DEPARTMENT DATED JANUARY 13, 2017.

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(A) E/TURKEY NEVER DESCRIBED THE ITEMS STOLEN FROM HIM TO P.O. LANNING.

(B) HOW THE ATTACK OCCURED.

(C) DESCRIPTION OF THE PERPETRATORS.

"NO WE JUST ASKED HIM TO GET IN THE VEHICLE RIGHT AWAY" (AB12, AB18-AB20, AB5-AB7).

DURING THE BRIEF CONVERSATION BETWEEN E/TURKEY AND P.O. LANNING WHICH LASTED ONLY SECONDS, THE ONLY WORDS P.O. LANNING RECALLS THAT E/TURKEY SAID IN HIS PRESENCE IS "I WAS ROBBED" AND "THEY WENT THAT WAY" POINTING SOUTHBOUND.

(D) NOT THE NUMBER OF MALES INVOLVED.

(E) NOTHING ABOUT A KNIFE.

(F) NOTHING (EMPHASIS ADDED)

(AB7, AB9, AB12, AB18-AB19)

P.O. LANNING HAD E/TURKEY SET IN THE BACKSEAT OF HIS CAR AND THEN DROVE SOUTHBOUND ON I-05 STREET, AND WITHIN SECONDS, P.O. LANNING OBSERVED TWO SUSPECTS ONE WHO LATER WAS IDENTIFIED AS ELIJAH BROOKS, WHOM WAS WEARING A WHITE SHIRT AND BLACK PANTS,

ALSO A BASEBALL CAP. EL TURKEY POINTED AT BROOKS AND STATED "THAT'S THE GUY THERE" P.O. LANNING THEN EXITED HIS CAR AND STOPPED BOTH MEN (BA27-BA28). THE TOTAL TIME THAT ELAPSED BETWEEN WHEN P.O. LANNING CAME IN CONTACT WITH EL TURKEY, STOPPED THE TWO SUSPECTS AND PUT THE HANDCUFFS ON BROOKS WAS BRIEFLY TWO MINUTES. P.O. LANNING STATED AS TO BROOKS ARREST "IT WAS NOT TAKEN BY MYSELF" "BUT THE ARREST WAS TAKEN BY P.O. PAMPENA AT THE TIME" P.O. LANNING REMAINED ON THE SCENE AFTER BROOKS WAS TRANSPORTED AWAY (BA20, BA26-BA28). AT THIS POINT THE RECORD IS CLEAR THAT P.O. PAMPENA IS BROOKS ARRESTING OFFICER.

③ FROM THE FELONY COMPLAINT P.O. PAMPENA FILED, DATED JULY 4, 2012 WHICH STATES: "DEPONENT FURTHER STATES THAT WHEN HE PLACED THE DEFENDANT IN THE CELL AT 115 PCT IN QUEENS COUNTY AND UNCUFFED THE DEFENDANT, THE DEFENDANT STARTED SWINGING HIS ARMS AND KICKING HIS FEET TOWARDS POLICE OFFICER AND A POLICE SERGEANT WHO WAS RIGHT NEXT TO HIM."

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④ P.O. LANNING WROTE IN HIS MEMO BOOK THAT THE TWO INDIVIDUALS WERE STOPPED BY P.O. PAMPENA.

⑤ P.O. PAMPENA ACCORDING TO THE GPRINT REPORT WAS THE FIRST RESPONDER TO THE CRIME SCENE, 9:03 P.M.

⑥ P.O. LANNING STATED "HE WAS NOT BROOKS ARRESTING OFFICER, BUT HE DID SPEAK BRIEFLY WITH MR E TURKEY" (BA15-BA16).

P.O. PAMPENA ON JULY 3, 2012 WAS ALSO ASSIGNED TO 115 Pct, HE WAS IN UNIFORM ON PATROLE IN AN UNMARKED CAR, AT 9:00 P.M., WHEN HE HEARD A RADIO CALL ABOUT A KNIFE POINT ROBBER IN PROGRESS ON 105 STREET AND NORTHERN BOULEVARD, DESCRIBING THREE BLACK MALES ONE WEARING A WHITE SHIRT, BLACK PANTS (AB 23, AB 25). P.O. PAMPENA DID NOT RECALL THE RADIO CALL:

⑦ DESCRIBING THREE BLACK MALES, JUST BLACK MALES, NOT THE NUMBER (AB 25, AB 35-AB 36, AB 56).

⑧ INDICATING A KNIFE POINT ROBBERY

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① WHETHER IT STATED THE AGE, WEIGHT OR HEIGHT OF SUSPECTS (AB37).

② FAILED TO WRITE ANYTHING DOWN (AB 35-AB37).

P.O. RAMBENA FIRST HEARD THE CALL AT 9:00 P.M. WHEN HE WAS ON 108 STREET AND ASTORCA BOULEVARD, THE ROUTE HE TOOK IS UNCLEAR, HOWEVER, HE FIRST OBSERVED APPELLANT RUNNING DOWN THE STREET ALONE WITH AN I-PHONE IN HIS HAND NORTHBOUND ON 105 STREET AWAY FROM NORTHERN BOULEVARD. P.O. RAMBENA IMMEDIATELY STOPPED HIS CAR IN THE MIDDLE OF THE STREET ON 105 STREET AND 32ND AVENUE WHEN HE GOT OUT THE SITUATION WAS NOT VOLATILE.

③ NO GUNS WERE DRAWN.

④ APPELLANT WAS NOT TACKLED.

⑤ P.O. RAMBENA DID NOT SAY ANYTHING, NOT "STOP POLICE" NOR DID HE MAKE ANY INQUIRY (AB24-AB25, BA32-BA33, BB35-AB36, AB 40-AB41).

APPELLANT STOPPED RIGHT IN FRONT OF P.O. RAMBENA AND SAID "I GOT (BROUGHT) THIS PHONE FROM 105 STREET AND NORTHERN BOULEVARD."

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HOWEVER P.O. PAMPENA DID NOT RECALL WHAT IF ANYTHING WAS HIS RESPONSE, AFTER APPELLANT MADE THIS STATEMENT. P.O. PAMPENA JUST SNATCHED THE PHONE, HANDCUFFED AND SEARCHED APPELLANT, NO KNIFE WAS RECOVERED. ALLEGEDLY \$250.00 U.S. CURRENCY WAS RECOVERED FROM APPELLANT'S FRONT POCKET (AB40-AB42). P.O. PAMPENA'S OBSERVATION OF APPELLANT'S PHYSICAL CONDITION NOTES HIS CLOTHES WERE DISHEVELED. HOWEVER P.O. PAMPENA WAS UNABLE TO RECALL WHETHER APPELLANT HAD ON HIM ANY:

(H) CUTS

(I) BRUISES

(J) BLOOD

(AB42-AB43).

P.O. PAMPENA NEVER SAW APPELLANT ON 104 STREET AND 32ND AVENUE WHERE THE SPRINT REPORT INDICATES HE WAS STOPPED AT 9:06 P.M. NOTE: P.O. PAMPENA ARRIVED AT THE CRIME SCENE AT 9:03 P.M. AND HE STOPPED APPELLANT BEFORE GOING TO 105 STREET AND NORTHERN BOULEVARD AND P.O. PAMPENA NEVER SAW ELSA BROOKS ON 105 STREET AND NORTHERN BOULEVARD BECAUSE APPELLANT WAS BROUGHT TO THE CRIME SCENE BY P.O. PAMPENA AS BROOKS WAS BEING TRANSPORTED AWAY (AB29-AB30, AB32-AB

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34, AB38-AB39, AB44). P.O. PAMPENA ARRIVED AT THE CRIME SCENE WITH APPELLANT AT 9:03 P.M., WHERE HE FIRST OBSERVED MR E TURKEY BEING TREATED BY EMS, HE WAS ALREADY SITTING IN THE BACK OF THE AMBULANCE ON THE CORNER OF 105 STREET AND NORTHERN BOULEVARD. NOTE: ACCORDING TO THE EMS SPRINT REPORT THE TRUCK ARRIVED ON 106 STREET AND NORTHERN BOULEVARD AT 9:11 P.M. (AB29, AB44-AB48, BA33-BA48). P.O. PAMPENA'S FIRST OBSERVATION OF MR E TURKEY'S PHYSICAL CONDITION WAS THAT E TURKEY HAD A SWOLLEN BLACK EYE AND A LACERATION TO THE HEAD. E TURKEY LOOKED LIKE HE JUST GOT BEAT UP, JUMPED, MUGGED, HIS CLOTHES WAS DISHEVELED, COVERED IN BLOOD AND RIPPED UP. AT THAT TIME P.O. PAMPENA HAD A CONVERSATION WITH E TURKEY WHILE SITTING SHOULDER TO SHOULDER AS E TURKEY WAS BEING TREATED, E TURKEY STATED:

⑩ HE WAS BEAT UP AND ROBBED BY TWO MALE BLACKS ONE BIG, ONE SMALL, OUTSIDE THE CHECK CASHING PLACE ON 106 STREET AND NORTHERN BOULEVARD

⑪ HE IDENTIFIED THE I-PHONE THROUGH A PASSWORD.

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⑭ HE DESCRIBED THE ATTACK.

⑮ P.O. PAMPENA DID NOT TELL EL TURKEY THAT HE RECOVERED THE PROPERTY FROM THE APPELLANT (BA 34, AB 27-AB 32, AB 51-AB 53, TRI 512-TRI 517). P.O. PAMPENA CONDUCTED A SHOW UP IDENTIFICATION AT THE TIME OF APPELLANT WHO WAS HANDCUFFED, FLANKED BY A UNIFORM POLICE OFFICER STANDING NEXT TO A POLICE CAR, THREE CAR LENGTHS AWAY WITHOUT THE USE OF ANY FLASHLIGHT OR ILLUMINATION. THE ONLY THING EL TURKEY SAID WAS "THAT'S HIM" (AB 27-AB 32, AB 46-AB 48, AB 51-AB 53, BA 33-BA 36, BA 47-BA 48, TRI 512-TRI 517, TRI 553-560).

P.O. PAMPENA THEN FILLED OUT AN AIDED CARD, WHILE EL TURKEY REFUSES ALL MEDICAL ATTENTION AND GIVES A STATEMENT THAT HE WAS JUMPED BY A GROUP OF GUYS. THEN P.O. PAMPENA APPROACHED APPELLANT AFTER HIS CONVERSATION WITH EL TURKEY TO PLACE HIM BACK INTO THE POLICE CAR, AND APPELLANT WANTED TO KNOW WHAT HE WAS BEING CHARGED WITH. P.O. PAMPENA STATED ROBBERY AND IN RESPONSE APPELLANT SAID "IF THE GUY SAID IT'S HIS, THEN I GUESS IT WAS HIS" (AB 33, AB 49, BA 36-BA 38, BA 40-BA 43, BA 49-BA 52, TRI 428-TRI 430, TRI 640-TRI 643).

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HEARING COURT DECISIONS

ON DECEMBER 17, 2012 THE ATTORNEY FOR APPELLANT, LINDA POUMAN, SUBMITTED AN OMNIBUS MOTION TO PART TAP "A" FOR JUDGE CAMACHO, WHO RETURNED A DECISION/ORDER DATED DECEMBER 19, 2012 GRANTING APPELLANT'S MOTION TO THE MAP, HUNTLEY, WADE, DUNAWAY HEARINGS, THEREAFTER. ON MAY 21, 2013 THE HEARING WAS CONDUCTED AT PART K-20 BY JUDGE HOLLE, AND AT THE CONCLUSION HE DENIED THE DUNAWAY/WADE PORTION OF THE HEARINGS. SUBSEQUENTLY APPELLANT'S CO-DEFENDANT BY MOTION SOUGHT A NEW HEARING FOR THE COURT TO CONSIDER DISCOVERY MATERIAL, SPECIFICALLY THE EMS REPORT WHICH WAS PROVIDED TO THE DEFENCE BY THE PEOPLE SUBSEQUENT TO THE HEARING. THE CO DEFENDANT'S MOTION FOR A NEW HEARING WAS DEEMED TO BE A MOTION TO VACATE THE DECISION OF THIS COURT DATED OCT 7, 2013. THE COURT GRANTED THE MOTION TO RE-OPEN THE HEARING FOR THE INTRODUCTION OF THE EMS REPORT. DURING THE COURSE OF THAT HEARING ON JAN 8, 2014, IT WAS DISCOVERED THAT P.O. RAMPENA HAD FILLED OUT AN AIDED REPORT THAT WAS NEVER TURNED IN TO THE DEFENCE AS ROSARIO MATERIAL (AB1, AB61-AB64,

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BA36-BA52). LINDA POYMAN, ATTORNEY FOR APPELLANT REFUSED TO REST ON THE RECORD SUBJECT TO THE PRODUCTION OF THE ADDED CARD, TO WHAT JUDGE HOLTE ORDERED THE PEOPLE TO TURN OVER BY THE ADJOURNED DATE OF JAN 14, 2014 (BA36-BA38, BA49-BA52). ON JAN 14, 2014 JUDGE HOLTE RENDERS A DECISION/ORDER STATING: "THE REOPENED HEARING WAS CONCLUDED AND THE DEFENDANT'S MOTION TO SUPPRESS PURSUANT TO DUNAWAY/WADE WAS AGAIN DENIED. THEN ON FEBRUARY 20, 2014 APPELLANT APPEARED IN FRONT OF JUDGE KRON PART IAP-A, AT WHICH TIME APPELLANT ARGUED VIGOROUSLY IN AN ORAL ARGUMENT FOR PERMISSION TO SUBMIT A PROSE MOTION FOR RELIEF TO RE-OPEN THE HEARINGS ONCE AGAIN FOR THE PRODUCTION OF THE ADDED CARD, AND TO CROSS EXAMINE P.O. PAMPENA. JUDGE KRON ADVISED LINDA POYMAN TO FILE THE APPLICATION, WHICH SHE DID SUBMIT (N.M.A TRANS). ULTIMATELY ON MARCH 24, 2014 JUDGE HOLTE RENDERED A DECISION/ORDER STATING: "THE APPELLANT'S MOTION TO RE-OPEN THE HEARING FOR A SECOND TIME IS DENIED. THE HEARING WAS RE-OPENED ON JAN 4, 2014 UPON THE MOTION OF THE CO DEFENDANT

FOR THE COURT TO CONSIDER THE EMS REPORT WHICH WAS PROVIDED SUBSEQUENT TO THE INITIAL HEARING. A DECISION WAS RENDERED ON JAN 14, 2014 DENYING THE MOTION TO SUPPRESS. THE DEFENDANT HAS FAILED TO SET FORTH NEWLY DISCOVERED EVIDENCE WHICH WOULD WARRANT THE REOPENING OF THE SUPPRESSION HEARING (N.M.A. TRANS).

① NO HEARING WAS EVER RE-OPENED ON JAN 4, 2014 (N.M.A. TRANS).

② THE ADJUDICATED DATE JAN 14, 2014 SET FROM JAN 8, 2014 HEARING, NEVER TOOK PLACE FOR THE PRODUCTION OF THE AIDED CARD AND TO CROSS EXAMINE P.O. PAMPENA (BA36-BA52, N.M.A. TRANS).

③ ON JAN 14, 2014 APPELLANT WAS BROUGHT TO COURT AND PUT INTO THE HOLDING CELLS WHERE HE REMAINED ALL DAY UNTIL RETURNED TO Rikers Island (BA36-BA38, BA49-BA52).

④ ON JAN 4, 2014 APPELLANT WAS NEVER TRANSPORTED FROM Rikers Island TO COURT.

THE TRIAL

THE PEOPLE'S CASE

TEREK E/TURKEY A CAB DRIVER WHO WAS BORN IN EGYPT, SHARED A BASEMENT APARTMENT WITH A ROOMMATE ON 105 STREET BETWEEN NORTHERN BOULEVARD AND 32ND AVENUE IN JONA SECTION OF QUEENS. ON JULY 3, 2012 AT ABOUT 8:30 P.M. HE LEFT HIS APARTMENT TO PURCHASE A PACK OF CIGARETTES. FIRST HE WALKED TO AN ATM MACHINE IN A CHECK CASHING STORE AT THE CORNER OF 106 STREET AND NORTHERN BOULEVARD AND WITHDREW \$260.00 IN CASH. HE THEN WALKED ONE BLOCK TO A DELI LOCATED ON THE CORNER OF 105 STREET AND NORTHERN BOULEVARD WHICH HE FREQUENTED TO PURCHASE THE CIGARETTES. OUTSIDE THE DELI WAS A GROUP OF INDIVIDUALS AS WELL AS ON THE ADJACENT CORNER THEY LOOKED LIKE A "UNIFORM" ALL OF THEM WORE WHITE T-SHIRTS AND DARK JEANS. ONE OF THOSE INDIVIDUALS WAS A HOMELESS BLACK MAN WHOM E/TURKEY HAD SEEN BEGGING IN THE AREA MANY TIMES PREVIOUSLY E/TURKEY "WOULD GIVE HIM A DOLLAR OR COFFEE OR SOMETHING"

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THREE OR FOUR TIMES OVER THE COURSE OF MONTHS (TRC 345-TRC 347, TRC 359, TRC 398, TRC 405). HOWEVER WHEN ASKED IF THAT MAN IS IN THE COURTROOM, EL TURKEY REPLIED "HE IS NOT HERE" (TRC 336-TRC 346, TRC 392-TRC 393). AFTER EL TURKEY PURCHASED A PACK OF CIGARETTES IN THE DELI, HE LEFT THE STORE, LIT A CIGARETTE AND PHONED SOMEONE AS HE WALKED ALONG 105 STREET TOWARDS 34TH AVENUE. THOUGH HE HAD TESTIFIED BEFORE THE GRAND JURY THAT "HE BECAME AWARE THAT TWO BLACK MEN STARTED FOLLOWING HIM" AT THAT TIME, HE INSISTED THAT HE WAS FOLLOWED BY ONE BLACK MAN WHOM HE DESCRIBED AS WEIGHING BETWEEN 250 AND 300 POUNDS, AND WEARING A WHITE SHIRT AND DARK JEANS. AS HIS APPREHENSION GREW EL TURKEY WALKED INTO THE STREET TO GO BACK IN THE DIRECTION OF THE DELI. AFTERWARDS HE HEARD THE MAN WHOM WAS FOLLOWING HIM TELL SOMEONE TO PUNCH HIM, THE MAN THEN PUSHED HIM TO THE GROUND BETWEEN TWO PARKED CARS. HE OBSERVED THAT THE HOMELESS MAN WHOM HE HAD SEEN EARLIER WAS BEHIND HIM ON THE GROUND. WHILE THE HEAVYSET MAN THEN SLAMMED AND PUNCHED HIM IN THE FACE, THE HOMELESS MAN REPPED HIS PANTS POCKETS AND

REMOVED HIS CELL PHONE AND WALLET WHICH CONTAINED \$250 IN CASH (TRI 347-TRI 368). THE HEAVYSET MAN THEN SLAMMED HIS HEAD AGAINST THE CURB TWO OR THREE TIMES, CURSED HIM AND THREATENED TO KILL HIM. AS A RESULT EL TURKEY'S EYE BECAME SWOLLEN, ONE HIS TEETH WAS LOOSE AND HE FELT PAIN IN HIS FACE (TRI 347-TRI 370, TRI 393-TRI 402). WHEN THE ATTACK ENDED, EL TURKEY OBSERVED THE HEAVYSET MAN PROCEED UP 105 STREET TOWARDS 34TH AVENUE. HOWEVER HE DID NOT OBSERVE WHERE THE HOMELESS MAN WENT. AFTER ABOUT A MINUTE, HE STOOD UP AND WENT BACK INSIDE THE DELI AND TOLD THE MANAGER THAT HE HAD BEEN MUGGED AND ASKED HIM TO CALL THE POLICE. WHILE INSIDE THE DELI THE HEAVYSET MAN RETURNED TO THE FRONT OF THE DELI AND THREATENED AND CURSED AT EL TURKEY AGAIN. EL TURKEY CLAIMED HE RECOGNIZED THIS MAN BECAUSE HE WAS WEARING THE SAME CLOTHING THAT HE WORE DURING THE ROBBERY A RED SHIRT AND BLACK PANTS (TRI 370-TRI 372, TRI 402-TRI 409). ABOUT 15 SECONDS LATER EL TURKEY EXITED THE DELI AND HE APPROACHED TWO PLAIN CLOTHES POLICE OFFICERS IN AN UNMARKED CAR. HE GOT IN THE CAR AND RODE WITH THOSE OFFICERS FOR ABOUT

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60 TO 80 FEET, WHEN HE OBSERVED THE HEAVYSET MAN AND ANOTHER TALLER MAN IN THE STREET (TRE 372-TRE 377). EL TURKEY EXITED THE CAR AND IDENTIFIED THE HEAVYSET MAN AS THE ONE WHO PUNCHED HIM, HOWEVER HE DID NOT IDENTIFY THAT MAN WHEN ASKED IF HE RECOGNIZED HIM IN THE COURTROOM (TRE 373-TRE 378, TRE 409-TRE 414). AFTER EL TURKEY IDENTIFIED THE INDIVIDUAL HE CLAIMED ROBBED HIM, THE PLAIN CLOTHES OFFICER PROCEEDED TO HANDCUFF THAT INDIVIDUAL WHOM WAS LATER IDENTIFIED AS APPELLANTS CO-DEFENDANT. OF PARTICULAR NOTE HOWEVER, THE ARREST WAS TAKEN BY A UNIFORMED POLICE OFFICER AND ACCORDING TO THE PLAIN CLOTHES OFFICERS MEMO BOOK, PLUS HIS TESTIMONY AT THE SUPPRESSION HEARING THEN AT TRIAL WAS "I ONLY PUT THE HAND-CUFFS ON HIM" AND "THE ARREST WAS TAKEN HOWEVER BY P.O. PAMPENA AT THAT TIME" WHO ARRIVED ON IUS STREET AND STOPPED THE TWO INDIVIDUALS FIRST, HE HAD TO BE THERE TO FILL OUT THE FELONY COMPLAINT. THOUGH THE PLAIN CLOTHES POLICE OFFICER REMAINED AT THE CRIME SCENE FOR ANOTHER 15 MINUTES, HE WAS UNABLE TO TESTIFY TO THE EVENTS THAT UNFOLDED ONCE HE

PUT THE CUFFS ON APPELLANT'S CODEFENDANT (AB8, AB14-AB21, BA15-BA16, BA20, BA24-BA27, TRI447, TRI455-TRE460, TRE463-TRI468) CONTRARY TO THE MEMO BOOK, FELONY COMPLAINT, AND P.O. LANNING'S TESTIMONY, P.O. PAMPENA INSIST THAT AFTER RECEIVING A RADIO CALL AT 9:00 P.M. OF A KNIFE POINT ROBBERY ON 105 STREET AND NORTHERN BOULEVARD BEING COMMITTED BY THREE MALE BLACK SUSPECTS, ONE WEARING A WHITE SHIRT AND BLACK PANTS, P.O. PAMPENA CLAIMED HE PROCEEDED FROM THE VICINITY OF 108 STREET AND ASCOTTA BOULEVARD TRAVELING ONE AVENUE UP AND THREE BLOCKS OVER. WHEN P.O. PAMPENA APPROACHED 105 STREET AND 32ND AVENUE HE OBSERVED APPELLANT RUNNING DOWN 105 STREET NORTHBOUND AWAY FROM NORTHERN BOULEVARD ALONE. APPELLANT FIT THE DESCRIPTION MATCHING THAT GIVEN OVER THE RADIO, OF A BLACK MALE WEARING A WHITE SHIRT AND DARK PANTS CARRYING A T-PHONE. P.O. PAMPENA IMMEDIATELY STOPPED HIS CAR AND GOT OUT, HE DID NOT SAY "STOP POLICE" NO GUNS WERE DRAWN, NOR WAS ANY PHYSICAL FORCE USED. THE SITUATION WAS NOT VOLATILE, THE APPELLANT STOPPED RIGHT IN FRONT OF P.O. PAMPENA'S CAR WHERE HE WAS STANDING AND SAID "I JUST

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BROUGHT THIS PHONE FROM 105 STREET AND NORTHERN." (AB 40-AB 41, TRI 501-TRI 507).

APPELLANTS APPREHENSION

P.O. PAMPENA THEN SNATCHED THE E-PHONE FROM APPELLANTS HAND AND WITHOUT INQUIRY CUFFED AND SEARCHED APPELLANT AT WHICH TIME \$250.00 U.S. CURRENCY WAS RECOVERED FROM HIS FRONT POCKET. OF PARTICULAR NOTE, THE RADIO CALL DID NOT STATE ANY ITEMS STOLEN FROM EL TURKEY AND NO KNIFE WAS RECOVERED. P.O. PAMPENA DID NOT RECALL THAT THE TRANSMISSION HAD INDICATED "THREE BLACK MALES" NOT THE NUMBER, NOR DID HE RECALL "KNIFE POINT" ROBBERY OR WHETHER THE RADIO CALL STATED THE AGE, WEIGHT, HEIGHT OF SUSPECTS OR WHETHER APPELLANT HAD ANY CUTS, BRUISES OR BLOOD ON HIM ANYWHERE (AB 23-AB 31, TRI 542-TRI 570). FURTHERMORE ACCORDING TO P.O. PAMPENA'S TESTIMONY AT THE SUPPRESSION HEARINGS AND AT TRIAL, IS THAT APPELLANT WAS TRANSPORTED BY HIM FROM 105 STREET AND 32ND AVENUE, AFTER APPELLANT WAS HANDCUFFED AND SEARCHED. P.O. PAMPENA THEN CALLED IN THE STOP OF APPELLANT TO CENTRAL AT THAT TIME.

THEN HE PROCEEDED TO TRANSPORT APPELLANT BACK TO THE CRIME SCENE ON 105 STREET AND NORTHERN BOULEVARD (AB25-AB30, BA30-BA52, TRI 51, TRI 513, TRI 551-TRI 555). THE TOTAL TIME IT TOOK P.O. PAMPENA, AFTER STOPPING APPELLANT AT 9:00 P.M. AND BRINGING HIM BACK TO THE CRIME SCENE ON 105 STREET AND NORTHERN BOULEVARD, TOOK THREE MINUTES. P.O. LANNING'S TESTIMONY BOTH AT THE SUPPRESSION HEARINGS AND AT TRIAL, ALONG WITH HIS MEMO BOOK, CONFIRMS THAT P.O. PAMPENA WAS PRESENT ON 105 STREET AND NORTHERN BOULEVARD AT 9:03 P.M. YET THE SPRINT REPORT HAS APPELLANT ON 104 STREET AND 32ND AVENUE BEING STOPPED BY POLICE AT 9:06 P.M., AND APPELLANT'S ARRIVAL AT THE CRIME SCENE AT 9:08 P.M. P.O. LANNING ALSO TESTIFIED THAT HE, P.O. PAMPENA AND BROOKS WERE PRESENT AT THE CRIME SCENE AT 9:03 P.M., HOWEVER THE APPELLANT WAS NOT (TRI 461-TRI 482). P.O. PAMPENA INSISTED THAT THE RECOLLECTION OF THE EVENTS ON THE NIGHT OF JULY 3, 2012 AS TESTIFIED TO BY P.O. LANNING, HIS MEMO BOOK, THE 911 SPRINT REPORT, MR. EL TURKEY TRIAL TESTIMONY, THE EMS TECHNICIANS TRIAL TESTIMONY, HIS EMS REPORT

AND THE EMS RELAY SHEET WERE ALL ALL WRONG. WHEN P.O. PAMPENA WAS ASKED TO CLARIFY THE DISCREPANCIES IN THE TIME, HIS RESPONSE WAS "I ARRIVED AT THE CRIME SCENE AT 9:03 P.M. AND I HAD STOPPED APPELLANT BEFORE I ARRIVED" AND WHEN HE WAS ASKED, DID YOU CALL IN THE STOP OF APPELLANT? HE ANSWERED "YES" (AB 35-AB 40, AB 56, BA 30-BA 47, TRI 373 - TRI 379, TRI 455 - TRI 468, TRI 548 - TRI 570) TRI 418 - TRI 427, TRI 644 - TRI 645). DESPITE P.O. PAMPENA'S TESTIMONY THAT AT 9:03 P.M. UPON ARRIVING AT THE CRIME SCENE APPELLANT'S CO-DEFENDANT WAS BEING TRANSPORTED AWAY, HE HOWEVER FILED A FELONY COMPLAINT REPRESENTING HIMSELF AS BROOK ARRESTING OFFICER. THE COMPLAINT READ IN PART: "DEPONENT FURTHER STATES THAT WHEN HE PLACED THE DEFENDANT (BROOKS) INTO THE CELL AT 115 Pct, IN QUEENS COUNTY, AND UNCUFFED THE DEFENDANT, THE DEFENDANT STARTED SWINGING HIS ARMS AND KICKING HIS FEET TOWARDS POLICE OFFICER AND A POLICE SERGEANT WHO WERE RIGHT NEXT TO HIM (SEE ELIJAH BROOKS FELONY COMPLAINT).

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DEFENCE

BROOKS ARREST

ON JULY 3, 2012 AT 9:00 P.M. AFTER BEING ROBBED E/TURKEY WENT INSIDE THE DELE ON THE CORNER OF 105 STREET AND NORTHERN BOULEVARD FOR 90 SECONDS BEFORE HE LOOKED OUTSIDE THE DOOR AND SAW THE HEAVYSET GUY. THEREAFTER E/TURKEY EXITED THE STORE AND APPROACHED A BEIGE CHEVY PARKED AT INTERSECTION OF 105 STREET AND NORTHERN BOULEVARD GOING THE OPPOSITE WAY, AND CONFRONTED THE TWO POLICE OFFICERS WHOM HE TOLD E WAS 'MUGGED'. E/TURKEY WAS THEN TOLD TO JUMP IN THE CAR AND AND THEY TRAVELED 60 TO 80 FEET WHEN TWO GUYS WAS OBSERVED WALKING, ONE OF WHOM PUNCHED E/TURKEY. THE TWO POLICE OFFICERS WERE IN PLAIN CLOTHES ASSISTING E/TURKEY WHEN THE SUSPECTS WERE SPOTTED THEY STOPPED AND EXITED THE VEHICLE WHERE E/TURKEY REMAINED SITTING AS INSTRUCTED BY THEM. INSTANTANEOUSLY TWO OTHER POLICE OFFICERS ARRIVED WEARING UNIFORMS IN AN UNMARKED CAR, ONE WHITE, ONE HISPANICK, WHOM APPROACHED E/TURKEY SITTING IN THE BACK OF THE OTHER POLICE VEHICLE INQUIRING AS TO "WHAT HAPPENED?" E/TURKEY THEN EXITED THE VEHICLE PROMPTED BY THE TWO UNIFORMED POLICE OFFICERS AT WHICH TIME E/TURKEY IDENTIFIED

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APPELLANT'S CO-DEFENDENT AS ONE OF THE PERPETRATORS WHO ROBBED HIM. BROOKS WAS HANDCUFFED BY P.O. LANNING (PLAIN CLOTHES P.O.) AND THE ARREST OF BROOKS WAS TAKEN BY P.O. PAMPENA (UNIFORMED P.O.) AT THAT TIME (TRI 371 - TRI 376, TRI 413).

SUPPRESSION HEARING INVESTIGATION / ED.

APPELLANT'S ARREST

ADDRESSED DURING THE SUPPRESSION HEARING IS AS FOLLOWS: THE COURT: SO IN DESCRIBING WHAT IT IS THAT THE EL TURKEY SAID, IF YOU CAN REMEMBER JUST USE THE WORDS THAT HE USED (EL TURKEY). P.O. PAMPENA RESPONDED, "HE STATED THE BIG BLACK GUY WITH THE SHAVED HEAD WAS THE ONE THAT STARTED ASSAULTING HIM WHEN HE CAME OUT OF THE CHECK CASHING PLACE. THE A SMALLER BLACK GUY WENT INTO HIS POCKETS AND TOOK HIS PHONE AND HIS WALLET." P.O. PAMPENA WAS UNABLE TO RECALL ANY OTHER INFORMATION PROVIDED HIM FROM EL TURKEY (ABS1-ABS2). P.O. PAMPENA WAS ASKED SPECIFICALLY ABOUT THE PRIOR INVESTIGATION CONDUCTED WHILE INSIDE EMS TRUCK WITH EL TURKEY. NOW WHEN YOU WERE NEXT TO HIM, DID YOU HAVE ANY CONVERSATION REGARDING MR BALL?

PREVIOUSLY TO ME GETTING IN THERE HE DED GIVE 9-1-1 A DESCRIPTION OF THE PEOPLE THAT ROBBED HIM. PAMPENA SAID. THE COURT THEN ASKED "RIGHT BUT AS YOU ARE SITTING WITH HIM IN THE AMBULANCE AND IF HE IS LOOKING AT MR BALL, IS HE SAYING ANYTHING OTHER THAN THATS HIM? PAMPENA RESPONDS "NO". HE ~~SAID~~ JUST SAID THATS HIM (BA 47-BA 48). NOTE P.O. PAMPENA FILLED OUT AN ADDED REPORT AT THIS TIME (BA 26-BA 28).

TRIAL

PRIOR TO SHOW UP.

E/TURKEY MAKES IT VERY CLEAR THAT HE WAS INFORMED BY POLICE THAT APPELLANT WAS IN FACT THE HOMELESS GUY THEY CAUGHT WITH HIS PROPERTY. PRIOR TO SHOW UP IDENTIFICATION AND THE APPELLANT BEING BROUGHT TO THE CRIME SCENE. E/TURKEY EXPLAINS IN DETAIL: "THEY TOLD ME THEY THINK THEY CATCH THE GUY BECAUSE HE ASK ME HOW MUCH MONEY?" "I SAID, ~~YES~~ \$250 DOLLARS" THEY SAID THEY FIND \$250 DOLLARS EXACTLY. THEY ASK ME "WHAT KIND OF PHONE? I-PHONE E/TURKEY REPLIED. THEY SAID THEY FIND I-PHONE, THEY FIND SOCIAL SECURITY AND MY LICENSE, SO IM NOT GOING TO SAY NOTHING (TRI 426).

SR129

24

THE JUDGE THEN ASKED E/TURKEY "DID THE COPS TELL YOU THEY CAUGHT THE GUY WITH YOUR CELL PHONE? HE RESPONDED "YES", THEY SAW HIM THROW SOMETHING IN THE FLOOR, THE PAPER, SOCIAL THE LICENSE, EVEN BRING TO THE PRECINCT." (NOTE: E/TURKEY'S WALLET, LICENSE, SOCIAL SECURITY CARD WAS RECOVERED AT THE CRIME SCENE (TR 572-TR 574). THE APPELLANT ASKED E/TURKEY "OKAY, NOW YOU SAID HERE RIGHT, THAT YOU KNEW THAT IT WAS THE HOMELESS GUY WHO ROBBED YOU, BECAUSE HE HAD YOUR MONEY AND YOUR I.D., IS THAT CORRECT? E/TURKEY EXPLAINS "NOT ME, THE POLICE KNOWS, WHEN THE POLICE FIND MY WALLET WITH SOMEONE" (NOTE E/TURKEY'S PROPERTY WAS FOUND IN SEWER GRATE AT CRIME SCENE TR 572-TR 574), SO IT'S LOGIC, IT'S HIM" (TR 420). APPELLANT CONTINUE TO CROSS EXAMINE E/TURKEY "YOU ALSO SAID, YOU KNEW IT WAS HIM BECAUSE YOU ALREADY KNEW IT WAS HIM THAT HAD THE MONEY SO YOU KNOW"? E/TURKEY RESPONDS "I DIDN'T ARREST HIM TO FIND HE HAS THE MONEY" (TR 425). APPELLANT ASKED E/TURKEY "I JUST NEED TO KNOW SPECIFICALLY WHETHER OR NOT YOU WERE INFORMED, THAT IT IS THAT THE FACT THAT THE COPS CAUGHT HIM"? E/TURKEY SAID "YES, THEY SAY THEY GOT THE GUY" AND THAT THEY FOUND THE MONEY PROPERTY? THEY FOUND THE PROPERTY WITH HIM "YES" E/TURKEY REPLIED. (TR 425-TR 427)

SR130

25

IN COURT IDENTIFICATION

ADA SHORT IN HIS OPENING STATEMENT AT TRIAL DECLARED THE FOLLOWING: HE (E/TURKEY) WENT BACK TO 105 STREET TO PICK UP COFFEE AND HAVE A CIGARETTE WITH HIS FRIEND. WHEN TEREK GOT THE CORNER OF 105 AND NORTHERN BOULEVARD, HE SAW AN ALL TO FAMILIAR FACE, THE DEFENDANT RAYMOND BALL. DURING THE TRIAL YOU WILL HEAR THAT HE IS A FIXTURE IN THE NEIGHBORHOOD. YOU WILL ALMOST ALWAYS FIND HIM IN FRONT OF THAT DELI ON THAT CORNER. TEREK WILL TELL YOU HE HAS SEEN HIM A DOZENS, HUNDREDS OF TIME, CAN YOU HELP ME OUT GIVE ME SOMETHING, DOLLAR \$5. MOST OF THE TIME HE PAYS HIM NO MIND. SOME DAYS HE MAY THROW HIM A BUCK OR TWO TO BE RID OF HIM. ON THAT NIGHT TEREK DID NOT KNOW THAT RAYMOND BALL WAS NOT GOING TO TAKE NO FOR AN ANSWER. TEREK WENT INSIDE THE STORE AND HE HAD A COFFEE... HE COULD SEE THE FRONT OF THE DELI WAS CROWDED WITH PEOPLE THAT HE HAD NOT SEEN BEFORE AND ONE HE HAD RAYMOND BALL (TCE 321-322). DURING TRIAL THE MOST CRUCIAL PEECE OF EVIDENCE PRESENTED (ALBEET FOR THE FIRST TIME) WAS E/TURKE KNOWING APPELLANT PRIOR TO ROBBERY.

SR131

26

EL TURKEY WAS ASKED "BEFORE YOU WALKED INTO THE DELE DID YOU SEE ANYBODY THAT YOU HAD SEEN BEFORE? I SEEN ONE GUY HE SAID. "WHO WAS THAT GUY"? HE IS A BLACK GUY, HOMELESS, I ALWAYS GIVE HIM DOLLAR OR COFFEE OR SOMETHING, EL TURKEY SAID. FOR HOW LONG HAVE YOU BEEN SEEING HIM THERE FOR WEEKS, MONTHS, HOW LONG? YEAR, MAYBE LIKE WEEKS, MONTHS AND A HALF, HE SAID. "WHAT WAS HE DOING"? HE WAS STANDING WITH A BUNCH OF GUYS (EIGHT GUYS WEARING WHITE LIKE UNIFORM PRE 405) EL TURKEY SAID. WHAT DID HE DO TO YOU? HE WAS THE ONE BEHIND ME AND THE ONE HE TOOK THE MONEY AND THE PHONE HE SAID. "WHO DID THE POLICE OFFICERS BRING TO SHOW YOU"? HE BRING THE HOMELESS, EL TURKEY SAID. "DID YOU RECOGNIZE THE PERSON"? HE BRING THE HOMELESS, EL TURKEY SAID. I AM GOING TO ASK YOU TO TAKE A LOOK AROUND THE COURTROOM AND SEE IF YOU RECOGNIZE THE PERSON THAT YOU HAVE TALKED ABOUT JUST NOW? HE IS NOT HERE, EL TURKEY SAID. "LOOK AROUND THE WHOLE COURTROOM SIR, EL TURKEY WAS INSTRUCTED. NO, NOT HERE HE SAID. (TR1371-TR1385). ONCE AGAIN THERE WAS AN ATTEMPT TO GET EL TURKEY TO CONFIRM THAT APPELLANT WAS IN FACT THE HOMELESS GUY. (NOTE: APPELLANT REPRESENTED HIMSELF THROUGHOUT THE TRCA AND QUESTIONED EL TURKEY DIRECTLY).

SR132

27

SO THE JUDGE INSTRUCTED EL TURKEY TO "SEE IF YOU SEE THE HOMELESS GUY" AND HE RESPONDED WITH CERTAINTY, NO I KNOW HIM VERY WELL, NO I KNOW HIM A LONG TIME (TREC 384 - TREC 385). ADA SHORT ASKED EL TURKEY, I JUST WANT TO BACK UP A LITTLE BIT, GOING BACK TO WHEN YOU WERE AT THE AMBULANCE, YOU SAID "THE POLICE OFFICERS BROUGHT SOMEBODY OVER TO YOU, A PERSON"? THE POLICE OFFICERS SHOWED YOU A PERSON? EL TURKEY REPLIED IN THE NEGATIVE, "NOT THE AMBULANCE (AS TESTIFIED TO BY P.O. PAMPENA), OUTSIDE THE AMBULANCE (EMPHASIS ADDED), I WAS IN THE SAME SPOT DURING THE COURSE, THE UNDERCOVER ARREST THE GUY (BROOKS). ADA SHORT ASKED EL TURKEY "WAS THE AMBULANCE THERE AT THE TIME"? EL TURKEY RESPONDED, "BUT THE AMBULANCE IN THE CORNER IN NORTHERN BOULEVARD. SO THE JUDGE ASK EL TURKEY "WHAT DID HE LOOK LIKE"? HE SAID SOMETIME HE ACTED LIKE A GAY, ACT LIKE A WOMEN SOMETIME, THIS IS THE HOMELESS GUY. "OKAY, DO YOU REMEMBER WHAT THE HOMELESS GUY WAS WEARING THE DAY HE ASSAULTED YOU"? "I GUESS JEANS AND WHITE SHIRT," EL TURKEY SAID (TREC 384 - TREC 386).

SR133

28

DURING APPELLANTS CROSS EXAMINATION OF EL TURKEY ASKED: "MY NEXT QUESTION IS THIS MR EL TURKEY THE NIGHT OF THE CRIME THAT THIS TERRIBLE THING HAPPENED TO YOU YOU KNOW IN THE GRAND JURY TESTIMONY YOU NEVER IDENTIFIED I HAVE HERE, RIGHT YOU WAS ASKED OKAY BY THE OFFICER THAT CAME TO THE CRIME SCENE HOW DID THE PERSON LOOK"? DID THE POLICE ASK YOU WHAT THE PERSON WHO ASSAULTED YOU LOOK LIKE"? DID HE ASK FOR A DESCRIPTION"? "YOU KNOW YOUR DESCRIPTION IS WHAT DO YOU CALL ONLY OF A BLACK GUY, GAY GUY, HOMELESS GUY"? EL TURKEY REPLIED, YEAH BLACK GUY, SAME TALL LIKE ME. "HOW TALL ARE YOU"? "DO YOU KNOW HOW TALL YOU ARE"? YES, LIKE FIVE SIX, BUT HE IS MAYBE A LITTLE SHORTER (APPELLANT IS 5'9") TO ME AND CURL HAIR (APPELLANTS HAIR WAS CUT LOW TO THE SCALP). "CURL HAIR"? YEAH, LIKE ALWAYS BLACK GUYS HAIR. "CURL"? YES. "LIKE DREADLOCKS"? YES. "IS IT LIKE JAMAICAN OR LIKE GERL"? LIKE JAMAICAN BUT SHORT, SAME LIKE YOUR HAIR. THE JUDGE ASKED: "DO YOU MEAN LIKE TIGHT CURLS"? YES (NOTE APPELLANTS HAIR WAS CUT SHORT TO THE SCALP AT TRIAL). "YOU MENTIONED EARLIER THAT THE GUY IS GAY IS THAT CORRECT"? HE ACT GAY, I'M NOT. "DID YOU EVER SEE HIM DRESSED DIFFERENTLY THAN A MAN"? SOMETIMES, YEAH SOMETIME HE DRESS LIKE A WOMAN
 2142 112 217N / 100 417 - 100 417

SR134

29

ALRIGHT, WELL MY NEXT QUESTION IS THIS
MR E/TURKEY THANK YOU; YOU ARE BEING VERY
HELPEFUL. YOU ARE WELCOME, I KNOW YOUR JOB;
E/TURKEY SAID (TRE 425-TRE 426). THERE
WAS NO DOUBT IN E/TURKEYS MIND AS TO
WHO THE APPELLANT WAS AT TRIAL, WHEN HE
DECLARED, SIMILAR HAIR LIKE THE LAWYER
(EMPHASIS ADDED).

CONCLUSION:

P.O. PAMPENA GIVES AN ELABORATE STORY OF
HOW AFTER RECEIVING A RADIO CALL OF A KYLE
POINT ROBBERY AT 9:00 P.M. ON LOS STREET AND
NORTHERN BOULEVARD, SPOTS APPELLANT EN
ROUTE WHO FITS THE DESCRIPTION, AND
CARRYING A PHONE (BEING PART AND PARCEL
OF CRIME HAD NOT YET BEEN COMMUNICATED).
AT 9:00 P.M. P.O. PAMPENA APPREHENDS
APPELLANT, HANDCUFFS, FINDS \$250 DURING
THE SEARCH THEN TRANSPORTS APPELLANT
BACK TO CRIME SCENE WITHIN THREE
MINUTES, ARRIVING AT 9:03 P.M. E/TURKEY
ALLEGEDLY WAS ALREADY INSIDE EMS
TRUCK BEING TREATED. WHILE INSIDE
EMS TRUCK P.O. PAMPENA CONDUCTS AN
INVESTIGATION AND SHOW UP WITH E/
TURKEY OF APPELLANT, AND FILLS OUT AN AIDED
REPORT AT THAT TIME.

SR135

30

THE FOLLOWING EVIDENCE AND TESTIMONY NOT ONLY PROVES P.O. PAMPENA FABRICATED THE SHOW UP AND EVENTS, BUT THAT THEY TOO WERE IMPOSSIBLE. P.O. LANNING'S MEMO BOOK READS: "P.O. PAMPENA STOPPED TWO INDIVIDUALS ON 105 STREET." ALSO P.O. LANNING TESTIFIED "I ONLY PUT THE COFFS ON BROOKS. PAMPENA TOOK THE ARREST AT THE TIME (TR 8-TR 9, BA 27-BA 28). APPELLANT WHILE QUESTIONING P.O. LANNING DECLARED: HE DID YOUR HONOR, PERTAINING TO THE ARREST (BROOKS) THAT AN OFFICER HAS TO BE ON THE SCENE IN ORDER FOR HIM TO TAKE CREDIT FOR THE ARREST, IS THAT CORRECT? SO THAT MEANS THAT OFFICER PAMPENA WAS ON THE SCENE WHEN MR BROOKS WAS ARRESTED IS THAT CORRECT? LANNING REPLIED IN THE POSITIVE "HE WAS THERE". HE WAS THERE ON THE SCENE? YEAH HE SAID. (TR 462-463). ALSO EL TURKEY TESTIFIED DURING QUESTIONING: "DID OTHER POLICE OFFICERS ARRIVE AT THAT LOCATION? YES HE SAID. "HOW SOON AFTER YOUR OFFICERS GOT OUT OF THE CAR? MAYBE 20, 25 SECONDS. SO QUICK, INSTANTANEOUS? YES HE SAID (TR 412-TR 413). THE JUDGE ASKED EL TURKEY: "NO WHEN DID YOU GET OUT OF THE POLICE CAR? WHEN THE OTHER THE UNIFORM POLICE COMING, AND THEY ASKED ME WHAT HAPPENED (TR 376-TR 378).

SR136

31

MR E/TURKEY'S TESTIMONY OF THE ABOVE EVENTS READS AS FOLLOWS: "WHEN THE OTHER OFFICERS CAME DID THEY BRING ANYBODY WITH THEM? HE TOLD ME HE GOING TO BRING THE GUY, THEY FIND THE MONEY WITH HIM AND FROM FAR AWAY, AND I CAN RECOGNIZE HIM I SAY YES OR NO, SO HE BRING HIM LIKE THIS TALKIE SO I TELL HIM YES, THIS GUY. OKAY. WHEN THE POLICE OFFICERS CAME, DID THEY SHOW YOU ANYTHING? HE SHOWED ME PHONES, E/TURKEY SAID, "WHAT DO YOU MEAN THEY SHOWED YOU PHONES? HE TOLD ME THIS YOUR PHONE, FIRST PHONE I SAID NO, IT WAS NOT MINE, LIKE BLACKBERRY OLD ONE, SO HE COME BACK WITH MY PHONE, HAS MY PICTURE AND EVERYTHING (TIRE 379 - TIRE 381). SO THEY BROUGHT THE HOMELESS GUY BACK TO THE SCENE OF THE CRIME...? NOT CLOSE FROM ME, E/TURKEY SAID, "I'M NOT ASKING? DON'T ARGUE, THE CRIME IS FROM FAR AWAY." OKAY. SO YOU KNOW HIM FROM FAR AWAY? YES, THEY BRING HIM NOT TOO CLOSE TO ME, NOT VERY CLOSE. THEY TOLD ME THEY GOING TO BRING HIM A LITTLE BIT AND RECOGNIZE HIM, SO BEFORE I KNOW HIM FROM FAR WAY (EMPHASIS ADDED) I SAID I KNOW IT'S THIS GUY. YOU ALSO SAID YOU KNEW IT WAS HIM BECAUSE YOU ALREADY KNEW IT WAS HIM THAT HAD THE MONEY, SO YOU KNOW?

SR137

32

I DIDN'T ARREST HIM TO FIND HE HAS THE MONEY, SO HE IS THE ONE THAT HAS THE MONEY (EMPHASIS ADDED, TRI 425).

E/TURKEY GIVES CLEAR TESTIMONY THAT NOT ONLY WAS HE INFORMED BY POLICE THAT APPELLANT WAS CAUGHT WITH HIS PROPERTY BEFORE APPELLANT WAS BROUGHT TO THE CRIME SCENE FOR SHOW UP, AND THAT IT NEVER TOOK PLACE WHILE HE AND P.O. PAMPENA WAS INSIDE EMS TRUCK, BUT FROM FAR AWAY (TRI 572 - TRI 574). ALSO APPELLANT WAS IDENTIFIED FIRST BY THE INFORMATION E/TURKEY RECEIVED FROM THE POLICE, THEN SHOWN EVIDENCE (BLACK BERRY PHONE NEVER TURNED IN) THEN LEFT OFF AND RETURNED WITH THE PHONE AND OTHER PROPERTY RECOVERED FROM A SEWER GRATE AT THE CRIME SCENE WHILE APPELLANT WAS BEING IDENTIFIED. P.O. PAMPENA'S ACCOUNT OF THE EVENTS ON THE NIGHT OF JULY 3, 2012 BECOMES IMPOSSIBLE WITH HIS TESTIMONY OF FILLING OUT AN AIOED CARD WHILE SITTING SHOULDER TO SHOULDER WITH E/TURKEY INSIDE EMS TRUCK DURING THE SHOW UP (BA 26 - BA 28). BECAUSE LIKE THE BLACKBERRY PHONE WAS NEVER TURNED IN BY POLICE. MR GONZALEZ EMS TECHNICIAN TESTIFIED (TRI 615 - TRI 645) THAT EMS TRUCK DID NOT ARRIVE UNTIL 9:11 P.M (SEE EMS RELAY SHEET TRI 645).

SR138

33

ANY DOUBT THAT P.O. PAMPENA AT 9:03 P.M. ON JULY 3, 2012 WAS PRESENT ALONG WITH ELOJAH BROOKS, P.O. LANNING AND MR E TURKEY IN THE CAPACITY OF BROOKS ARRESTING OFFICER. IS REMOVED BY THE FELONY COMPLAINT. P.O. PAMPENA FILED TO WIT: DEPONENT; WHEN HE PLACED DEFENDANT INTO THE CELL AT 115TH PCT... (SEE BROOKS FELONY COMPLAINT). HOWEVER P.O. PAMPENA IS DETERMINE TO DECEIVE EVERYONE AS TO THE EVENTS OF JULY 3, 2012. APPELLANT CONTINUES TO QUESTION P.O. PAMPENA: "NOW WHEN YOU GOT ME BACK TO THE CRIME SCENE DID YOU EVER TELL THE VICTIM THAT THE PERSON WHO HAD HIS PROPERTY HAD ALREADY BEEN ARRESTED? NO HE SAID, "YOU NEVER TOLD HIM THAT? NO; HE INSIST. "DID ANY OTHER POLICE OFFICER TELL HIM THAT? NO (SEE PRIOR TO TRIAL SHOW UP). MOREOVER P.O. PAMPENA WAS ASKED, "YOU SAID THAT WHAT YOU CALL RECOVERED AN I PHONE AND MONEY FROM ME; IS THAT CORRECT? YES, HE SAID. "DID YOU RECOVER ANYTHING ELSE FROM ME? NO, HE SAID. NOTHING ELSE? NO. "ARE YOU SURE? YES HE SAID. "OKAY WHEN YOU GOT BACK TO THE CRIME SCENE AND YOU EVENTUALLY, YOU SHOWED THE VICTIM, RIGHT, THE PROPERTY YOU GOT OFF ME, IS THAT CORRECT? AFTER I ASKED HIM WHAT WAS TAKEN, YES. "DID YOU EVER SHOW HIM A BLACK BERRY? NO, HE SAID. OKAY, RIGHT DID YOU EVER SEE ANOTHER SHOW HIM A BLACK BERRY? NO, HE SAID, I DID NOT (TRT 550 - TRT 510).

SR139

34

P.O. PAMPENA REFUSES TO CONCEDE TO P.O. LANNING AND E/TURKEY'S TESTIMONY, AND WHEN HE WAS ASKED: GREAT OFFICER PAMPENA, DO YOU UNDERSTAND THAT PERJURY IS A CRIME? RESPONDS ABSOLUTELY. APPELLANT ASKED P.O. PAMPENA: WE ARE READING FROM THE FIRST SUPPRESSION HEARING, MAY 21, 2013 REFERRING TO PAGE 29 LINE 24... OR 23 DOWN IT READS: AND YOU ALSO SAID THAT THERE WAS SOMEONE ELSE THERE, SOMEONE I THINK THAT YOU SAID WAS MR BROOKS. DID YOU ACTUALLY SEE MR BROOKS AT THE SCENE? AND YOUR RESPONSE WAS: NO, HE WAS ALREADY IN THE VEHICLE BEING TRANSPORTED AWAY AS I WAS ARRIVING AT THE SCENE.. SO I WOULD LIKE TO ASK YOU, WHEN YOU ARRIVED AT 105 STREET AND NORTHERN BOULEVARD WITH ME IN TOW, TWO MINUTES AFTER NINE, MR BROOKS WAS BEING TRANSPORTED AWAY, ACCORDING TO YOUR TESTIMONY, OKAY IN THE VEHICLE... AND I WOULD LIKE YOU TO HELP US WITH THIS, WHEN YOU ARRIVED AT THE CRIME SCENE TWO MINUTES AFTER, NO OTHER OFFICER WAS PRESENT, IS THAT CORRECT? PAMPENA RESPONDS "CORRECT" (TRI 566 - TRI 568 TRI 560). "POLICE OFFICER LANNING WASN'T THERE? CORRECT HE SAID (TRI 566 - TRI 568, TRI 560).

SR140

35

ALSO THE FIRST TIME GONZALEZ (EMS
TECHNICIAN) CAME IN CONTACT WITH MR
EL TURKEY WAS AT 9:21 P.M., AND AT 9:23
APPELLANT AND MR BROOKS WAS AT THE
PRECINCT (TRI 541), AND WHEN P.O. PAMPANA
WAS ASKED: "DID YOU EVER TAKE MR BROOKS
TO THE PRECINCT AND PUT HIM IN THE CELL?"
HE RESPONDED, "NO." (TRI 579) TRI 576, SEE
BROOKS FELONY COMPLAINT.

SR141

36

POINT ONE

AT THE SUPPRESSION HEARING THE EVIDENCE PRESENTED BY THE PEOPLE FAILED TO ESTABLISH THAT ON THE NIGHT OF JULY 3, 2012, P.O. PAMPENA DID AFTER ^{RECEIVING} A RADIO CALL DESCRIBING A ROBBERY IN PROGRESS OF THREE MALE BLACK SUSPECTS, ONE WEARING A WHITE SHIRT AND BLACK PANTS, STOPPED APPELLANT, HANDCUFFED, SEARCHED AND THEN TRANSPORTED APPELLANT TO THE LOCATION ON 105 STREET AND NORTHERN BOULEVARD WHERE DEREK B. (TURKEY) IDENTIFIED APPELLANT AS ONE OF THE PERPETRATORS. THOUGH THE HEARING COURT CONCLUDED THAT THE APPELLANT'S ARREST WAS SUPPORTED BY PROBABLE CAUSE, IT IS CLEAR THAT NO SUCH PREDICATE EXISTED. DURING THE JAN 8, 2014 HEARING APPELLANT PROVED THAT P.O. PAMPENA'S TESTIMONY IN THIS CASE WAS PERJURED (BA 2). TOO DURING THE HEARING IT WAS DISCOVERED THAT P.O. LANNING WAS NOT (BROOKS) APPELLANT'S CO DEFENDANT'S ARRESTING OFFICER, BUT HE DID "PLACE HIM IN CUFFS" (BA 15-BA 16). P.O. LANNING'S MEMO BOOK ALSO EVIDENCED "TWO MALES WAS STOPPED" P.O. PAMPENA ON 105 STREET."

P.O. LANNING TESTIFIED TO WHAT THAT ENTRY MEANS IS "I STOPPED THEM IN THE CORNER, BUT THE ARREST (BROOKS) WAS TAKEN BY P.O. PAMPENA AT THAT TIME". THEN E/TURKEY ALSO TESTIFIED TO P.O. PAMPENA BEING PRESENT DURING BROOK ARREST AND IDENTIFICATION. E/TURKEY WAS ASKED BY THE JUDGE "WHEN DID YOU GET OUT OF THE POLICE CAR"? (TO E.D. BROOKS) HIS RESPONSE WAS "WHEN THE OTHER, THE UNIFORMED POLICE COMING AND THEY ASKED ME WHAT HAPPENED"? (TRI 371 - TRI 376, TRI 413). ALSO WHEN P.O. PAMPENA WAS ASKED "DID YOU EVER TAKE MR BROOKS TO THIS PRECINCT AND PUT HIM INTO THE CELL?" RESPONDED "NO". DESPITE FELLING OUT A FELONY COMPLAINT REPRESENTING HIMSELF AS BROOK'S ARRESTING OFFICER STATING JUST THAT, P.O. PAMPENA SUBMITTED THIS WRITTEN INSTRUMENT FOR WHICH AN OATH IS REQUIRED BY LAW, WAS USED TO MISLEAD THE COURTS IN THE PERFORMANCE OF HIS OFFICIAL FUNCTION IN VIOLATION OF P.L. 210.10, 210.15 (TRI 576, TRI 579).

DURING THE HEARING APPELLANT ASKED P.O. PAMPENA "DID YOU ARREST ME?" HE REPLIED "YES". ALSO WHEN THE JUDGE ASKED P.O. PAMPENA "AND AT THE TIME YOU ARRIVED AT 9:05 THAT THE AMBULANCE WAS ALREADY THERE?" CORRECT WAS HIS ANSWER. THEN WHEN BROOKS LAWYER ASKED P.O. PAMPENA "YOU PREVIOUSLY TESTIFIED AT THE HEARING THOUGH THAT MR BROOKS WAS NO... NOT AT THE SCENE WHEN YOU ARRIVED?" HE REPLIED AGAIN CORRECT, "I WAS STILL DOING THE CANVAS WHEN I CAME IN CONTACT WITH THE OTHER DEFENDANT, MR BAI (BA 45-BA 46, AB 29-AB 30, AB 44, AB 52). HOWEVER IT WAS WHEN P.O. PAMPENA DURING THE SUPPRESSION HEARING FALSELY TESTIFIED, THAT HE RETURNED WITH APPELLANT TO 105 STREET AND NORTHERN BOULEVARD, WHERE HE CONDUCTED A SHOW UP IDENTIFICATION OF APPELLANT TO E/TURKEY WHO WAS BEING TREATED, AND FILLED OUT AN AIDED CARD INSIDE BACK OF EMS TRUCK WHILE SETTING SHOULDER TO SHOULDER WITH E/TURKEY." THAT CAUSED JUDGE HOLKE TO ORDER THE PEOPLE TO ON THE ADJURNED DATE OF JAN 14, 2014 TO TURN OVER AIDED CARD (POSARROMATERIA) BA 36-BA 52).

SR144

Rosario
violence

39

FURTHERMORE LENDA POULMAN, ATTORNEY FOR APPELLANT REFUSED TO REST ON THE RECORD SUBJECT TO THE PRODUCTION OF THE ADDED CARD (BA49), WHICH TO DATE NEVER TURNED OVER TO DEFENCE IN VIOLATION OF C.P.C. 240.44, 240.45, PEOPLE V ROSARCO 9 NY2D 286, PEOPLE V RANGHELLE 69 NY2D 56, PEOPLE V MARTINEZ 71 NY2D 937, (BA52). THERE WAS NEVER AN AFFIRMATIVE ANSWER GIVEN TO THE DEFENCE AS TO WHETHER OR NOT IT DID OR DID NOT EXIST (BA52). THE SUPPRESSION HEARING SCHEDULED FOR JAN 14, 2014 WAS TERMINATED, AND APPELLANT WAS DEPRIVED OF ONE FULL HEARING, PEOPLE V RECHETTE 302 NY 290, PEOPLE V LANGAN 303 NY 474, PEOPLE V BARTLAM 9 NY2D 550, PEOPLE V DAVIDS 564 NYS2D 320, PEOPLE V GELES 73 NY2D 666, PEOPLE V PAYTON 51 NY2D 169, ON FEB 20, 2014 APPELLANT MOVED TO HAVE THE HEARING ONCE AGAIN RE-OPENED FOR THE PRODUCTION OF THE ADDED CARD (ROSARCO MATERIAL) AND TO CROSS EXAMINE P.O. PAMPENA, PEOPLE V HAVELKA 412 NYS2D 345. HOWEVER ON MARCH 24, 2014 JUDGE HOLLE RENDERED A DECISION/ORDER DENYING THE MOTION FOR THE HEARING TO BE RE-OPENED FOR A SECOND TIME.

AT THE TERMINATION OF THE HEARING, JUDGE HOLLE, WITH NOTHING BEFORE HIM TO CAST DOUBT ON THE EXISTENCE OF THE AIDED CARD OR P.O. PAMPENAS UNRELIABILITY NOR ON THE FALSE INFORMATION HE PURPORTEDLY CONVEYED, CONCLUDED THAT PROBABLE CAUSE HAD BEEN SHOWN FOR THE APPELLANTS ARREST AND DENIED THE MOTION TO SUPPRESS, IN CONSEQUENCE OF WHICH THE CHALLENGED EVIDENCE WAS RECEIVED AGAINST APPELLANT UPON THE ENSUING TRIAL.

IT HAS BEEN MADE UNMISTAKABLY CLEAR IN PEOPLE V ROSARIO 9 NY2D 286, THAT DEFENCE COUNSEL MUST BE PERMITTED TO EXAMINE A WITNESSES PRIOR STATEMENT, WHETHER OR NOT IT DEPARTS FROM HIS TESTIMONY ON THE STAND, AND TO DECIDE FOR THEMSELVES THE USE TO BE MADE OF IT ON CROSS-EXAMINATION PROVIDED ONLY THAT THE STATEMENT "RELATES TO THE SUBJECT MATTER OF THE WITNESS TESTIMONY AND CONTAINS NOTHING THAT MUST BE KEPT CONFIDENTIAL. AND OBVIOUSLY, IT MATTERS NOT WHETHER THE WITNESS IS TESTIFYING UPON A TRIAL OR AT A SUPPRESSION HEARING. IN EITHER EVENT" A RIGHT SENSE OF JUSTICE ENTITLES THE DEFENCE TO ASCERTAIN WHAT THE WITNESS SAID ABOUT THE SUBJECT UNDER

SR 146

41

CONSIDERATION ON AN EARLIER OCCASION. PEOPLE V MALENSKY 262 NYS2D 65, PEOPLE V TURKINE 573 NYS2D 64, PEOPLE V LUMPKIN 533 NYS2D 792, PEOPLE V HOBART 266 NYS2D 110, PEOPLE V SHAINUCK 286 NY 161, PEOPLE V PEREZ 490 NYS2D 747, PEOPLE V ROSARCO 213 NYS2D 448.

ON JAN 14, 2014 APPELLANT WAS TRANSPORTED FROM Rikers Island TO Kew Gardens Queens Supreme Court AND PLACED IN A HOLDING CELL WHERE HE REMAINED ALL DAY UNTIL RETURNED TO Rikers Island. ACCORDING TO THE DECESSION ORDER RENDERED BY JUDGE HOLIE DATED JAN 14, 2014 WHICH STATES: "ON 1/4/2014 THE RE-OPENED HEARING WAS CONCLUDED AND THE DEFENDANT'S MOTION TO SUPPRESS PURSUANT TO DUNAWAY V NEW YORK 442 U.S. 208 AND UNITED STATES V WADE 388 U.S. 218 WAS AGAIN DENIED" ON JAN 4, 2014 APPELLANT WAS NOT EVEN TRANSPORTED FROM Rikers Island TO COURT ON THAT DAY. CONSEQUENTLY APPELLANT WAS DENIED HIS RIGHT TO BE PRESENT AT THE SUPPRESSION HEARING. * WHENEVER IT WAS CONCLUDED. IN VIOLATION OF APPELLANT'S CONFRONTATION AND DUE PROCESS CLAUSES OF THE FEDERAL *

SR147

42

AND STATE CONSTITUTION (SEE U.S. CONST 6TH, 14TH, AMENDS; NY CONST, ART 1, § 6) BUT BY C.P.L. 260.20, WHICH PROVIDES THAT A DEFENDANT MUST BE PERSONALLY PRESENT DURING THE TRIAL OF AN INDICTMENT "IN ADDITION" WHENEVER HIS PRESENCE HAS A RELATION REASONABLY SUBSTANTIAL TO THE FULLNESS OF HIS OPPORTUNITY TO DEFEND AGAINST THE CHARGE" WHICH APPLIES TO BE PRESENT DURING A PRETRIAL SUPPRESSION HEARING, DURING WHICH WITNESSES ARE EXAMINED AND CROSS-EXAMINED. NOTING: "DEFENDANT ALONE MAY BE ABLE TO INFORM HIS ATTORNEY OF INCONSISTENCIES, ERRORS AND TO CONFRONT OFFICER CAMPENA AS TO HIS FALSE TESTIMONY WHICH HAD A GREAT IMPACT ON APPELLANT GUILT OR INNOCENCE, PEOPLE V VELASCO 77 NY2D 469, PEOPLE V SLOAN 79 NY2D 386, PEOPLE V DOKES 584 NYS2D 761, PEOPLE V MULLEN 44 NY2D 1, SNYDER V MASSACHUSETTS 291 U.S. 97, PEOPLE V BIACCIO 47 NY2D 431, PEOPLE V ANDERSON 16 NY2D 282, PEOPLE V TURKINE 79 NY2D 660, PEOPLE V THORN 156 NY 286, PEOPLE EX REL LUPO V FAY 13 NY2D 253, PEOPLE V ANDERSON 266 NYS2D 110, KENTUCKY V STINER 482 U.S. 730.

SR148

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TOO LINDA FORDMAN ATTORNEY FOR APPELLANT WAS NOT PRESENT DURING THE AFOREMENTIONED SUPPRESSION HEARINGS DATED JAN 4, 2014 NOR ON JAN 14, 2014 IN VIOLATION OF APPELLANT'S CONSTITUTIONAL AND STATUTORY RIGHTS (NY CONST, ART 1, § 6, U.S. CONST, CODE CRIM PRO § 427) WHEN THE HEARING COURT ORDERED THAT THE SUPPRESSION HEARING PROCEED DESPITE THE FACT THAT THE APPELLANT'S ATTORNEY WAS NOT PRESENT IN THE COURTROOM. THE COURT ACTED IMPROVIDENTLY IN DENYING DEFENCE COUNSEL'S REQUEST TO RE-OPEN THE SUPPRESSION HEARING SO AS TO ENABLE HER TO CROSS EXAMINE P.O. RAMPENA WHO TESTIFIED IN HER ABSENCE. "LAWYERS IN CRIMINAL CASES ARE NECESSITIES NOT LUXURIES". THEIR PRESENCE IS ESSENTIAL BECAUSE THEY ARE THE MEANS THROUGH WHICH THE OTHER RIGHTS OF PERSONS ON TRIAL ARE SECURED. WITHOUT COUNSEL THE RIGHT TO A TRIAL ITSELF WOULD BE "OF LITTLE AVAIL". MOST OBVIOUS, OF COURSE IS THAT A TRIAL IS UNFAIR IF THE ACCUSED IS DENIED COUNSEL AT A CRITICAL STAGE OF HIS TRIAL. PEOPLE V ARMAS 483 NYS2D 121, U.S. V CROUSE 466 U.S. 648, HOLLOWAY V ARKANSAS 435 U.S. 475, UNITED STATES V WADE 388 U.S. 218, GILBERT

V. CALIFORNIA 388 U.S. 263, DUSKY V UNITED STATES 362 U.S. 402, UNITED STATES V HURT 543 F.2D 162, PEOPLE V SPELLER 520 NYS2D 418, GEORGE V WAENWRIGHT 372 U.S. 335. ON JAN 14, 2014 THE SUPPRESSION HEARING WAS TERMINATED AND THE APPELLANT WAS DEPRIVED OF ONE FULL OPPORTUNITY TO PRESENT THAT P.O. PAMPENA HAD LIES ABOUT FELLING OUT AN AIDED CARD DURING THE SHOW UP IDENTIFICATION OF APPELLANT BY E. TURKEY WHILE INSIDE EMS TRUCK, PEOPLE V RECHETTI 302 N.Y. 290, PEOPLE V LANGAN 303 NY 474, PEOPLE V BARTLAM 9 NY2D 550, PEOPLE V DAVIS 564 NYS2D 320, PEOPLE V GILES 73 NY2D 666, PEOPLE V PAYTON 51 NY2D 169, AND IF AN ERROR OF LAW IS COMMITTED BY THE HEARING COURT WHICH DIRECTLY CAUSES THE PEOPLE TO FAIL TO OFFER POTENTIALLY CRITICAL EVIDENCE, A REHEARING SHOULD BE ORDERED, SO THAT EVIDENCE MAY BE PRESENTED, PEOPLE V HAVELKA 45 NY2D 643, THE MISSING DOCUMENT IS RELEVANT TO P.O. PAMPENA'S DESCRIPTION OF E. TURKEY'S INJURIES HE GAVE ON DIRECT EXAMINATION AT THE HEARING AS NOTED ON THE AIDED CARD, PEOPLE V DEAN MORRIS 718 NYS2D 588.

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ACCORDING TO P.O. PAMPENA'S TESTIMONY PERTAINING TO THE SHOW UP IDENTIFICATION AND EL TURKEY'S INJURIES HE OBSERVED WHILE FILLING OUT THE AIDED CARD WHILE INSIDE EMS TRUCK, REQUIRED APPELLANT TO HAVE AN OPPORTUNITY TO CONFRONT P.O. PAMPENA AFTER THE ORDER WAS GIVEN BY JUDGE HOLLER TO TURN OVER THE AIDED CARD OR GIVE AN AFFIRMATIVE ANSWER TO IT'S EXISTENCE (BA44-BAS2). ESPECIALLY AS HERE WHERE APPELLANT CONTENDS THAT P.O. PAMPENA IS LYING ABOUT THE SHOWUP BEING CONDUCTED WHILE EL TURKEY WAS INSIDE EMS TRUCK, IT CANNOT BE DOUBTED THAT APPELLANT'S RIGHT TO CROSS-EXAMINE P.O. PAMPENA INCLUDED THE RIGHT TO CONFRONT THE WITNESS AGAINST HIM "ONE OF THE SAFEGARDS ESSENTIAL TO A FAIR TRIAL" WHICH INCLUDES AS A MINIMUM, A RIGHT TO CONFRONT THE WITNESS AGAINST HIM, TO OFFER TESTIMONY AND TO BE REPRESENTED BY COUNSEL, PEOPLE V PHONVILLE 254 NYS2D 775, KERBY V UNITED STATES 174 U.S. 47, ALFORD V U.S. 282 U.S. 687, IN RE OLIVER 333 U.S. 257, POINTER V STATE OF TEXAS 397 U.S. 129, KASTIGAR V U.S. 406 U.S. 441, US. VIANNIELO

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Pampena not credible

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740.F SUPP 171. SIMILARLY P.O. PAMPENA'S TESTIMONY AT THE HEARING THAT HE FILLED OUT AN AIDED CARD, WHILE CONDUCTING A SHOW UP OF APPELLANT TO EL TURKEY WAS DESPROVED BY EL TURKEY (TREC 376 - TREC 378, TREC 384 - TREC 385, TREC 412 - TREC 413). BY THE TESTIMONY OF HIS COLLEAGUE P.O. LANNING WHO WAS AT THE CRIME SCENE AND PUT (BROOKS) APPELLANT'S CO DEFENDANT IN CUFFS (BA 27 - BA 28, TREC 8 - TREC 9, TREC 462 - TREC 463) AND BY HIS OWN PAPERWORK (SEE BROOKS FELONY COMPLAINT) OR P.O. LANNING'S MEMO BOOK. DURING THE HEARING P.O. PAMPENA'S FALSE TESTIMONY WAS HELD TO BE THE AUTHORITY WHICH MOVED THE COURT, RATHER THAN APPELLANT'S CONSTITUTIONAL RIGHTS WHICH GUARANTEES PROTECTION FROM THE ANCIENT EVIL OF SECRET TRIAL. HENCE PRODUCTION OF THE AIDED CARD BECAME AN UNFULFILLABLE OBLIGATION, BECAUSE LIKE EVERYTHING ELSE WAS FABRICATED BY P.O. PAMPENA. SO RATHER THAN RESUME THE HEARING ON THE ADJURNED DATE OF JAN 14, 2014 AND TURN OVER THE STATEMENT FROM P.O. PAMPENA THAT HE HAD COMMITTED PERJURY OR DESTROYED THE AIDED CARD. THE COURT TERMINATED THE HEARING

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AND ABANDON THEIR DUTY TO DISCLOSE WHATEVER STATEMENT P.O. PAMPENA GAVE (BRADY V MARYLAND 373 U.S. 83) OR THE AIDED CARD (PEOPLE V ROSAREO 9 NY2D 286), PEOPLE V MALINSKI 262 NYS2D 65, PEOPLE V KASS 25 NY2D 123, PEOPLE V GELIGAN 39 NY2D 769, PEOPLE V ALONGI 131 AD2D 767, UNITED STATES V BAGLEY 473 U.S. 667, PEOPLE V CHEN 67 NY2D 22, PEOPLE V SPRINGER 122 AD2D 87, PEOPLE V FEEN 18 NY2D 162, PEOPLE V ROBINSON 133 AD2D 860. ADDITIONALLY WHERE THE PEOPLE FAIL TO EXERCISE DUE CARE IN PRESERVING ROSAREO MATERIAL AND THE APPELLANT IS PREJUDICED THE COURT MUST IMPOSE APPROPRIATE SANCTIONS, PEOPLE V WALLACE 76 NY2D 953, U.S. V AUGARS 427 U.S. 97, U.S. V BRYANT 439 F2D 642, HELLARD V SPRIDING 719 F2D 1446, ARIZONA V YOUNGBLOOD 488 US 51, PEOPLE V COLES 62 NY2D 908.

"THE CONSTITUTIONAL REQUIREMENT OF DUE PROCESS IN SAFEGUARDING THE LIBERTY OF THE CITIZEN AGAINST DEPREVATION THROUGH THE ACTION OF THE STATE EMBODIES THE FUNDAMENTAL CONCEPTIONS OF JUSTICE WHICH LIE AT THE BASE OF CIVIL AND POLITICAL INSTITUTIONS. IT IS A REQUIREMENT THAT

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CANNOT BE DEEMED TO BE SATISFIED BY
MERE NOTICE AND HEARING IF A STATE HAS
CONTRIVED A CONVICTION THROUGH THE
PRETENCE OF A TRIAL WHICH IN TRUTH IS
BUT USED AS A MEANS OF DEPRIVING A
DEFENDANT OF LIBERTY THROUGH A DELIBER-
ATE DECEPTION OF COURT AND JURY BY THE
PRESENTATION OF TESTIMONY KNOWN TO
BE PERJURED. SUCH A CONTRIVANCE BY A
STATE TO PROCURE THE CONVICTION AND
IMPRISONMENT OF A DEFENDANT IS AS
INCONSISTENT WITH FUNDAMENTARY
DEMANDS OF JUSTICE AS IS THE OBTAINING
OF A LIKE RESULT BY INTIMIDATION."
MOONEY V HOLAHAN 294 U.S. 103, HERBERT V
LOUISIANA 272 U.S. 312, NAPUE V ILLINOIS
360 U.S. 264, PYLE V KANSAS 317 U.S. 213, ALCOTA
ALCORTA V TEXAS 355 U.S. 28, GELTO V UNITED
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NY520 243, UNITED STATE V BASURTO 497 F2D 781,
UNITED STATES V FAHERTY 668 F2D 566, PEOPLE
V LEARY 305 NY793, PEOPLE V TYLER 46 NY2D
251, UNITED STATES V DEMARCO 401 FSUPP
505, PEOPLE V FEERICK 692 NYS2D 638. THE
FUNCTION OF A PROSECUTOR IS NOT TO TACK AS
MANY SKINS OF VICTIMS AS POSSIBLE TO THE
WALL. HIS FUNCTION IS TO VENDEICATE

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THE RIGHT OF PEOPLE AS EXPRESSED IN THE LAWS AND GIVE THOSE ACCUSED OF CRIME A FAIR TRIAL, UNITED STATES V KOJAYAN 1993 U.S. APP. LEXIS 23921, PEOPLE V GONZALEZ 2001 U.S. APP. LEXIS 25257, UNITED STATES V VAVAGES 151 F3D 1185. IT IS CLEAR THAT IN THIS CASE THE PROSECUTOR DID NOT. THIS CONNECTION SHOULD BE DISMISSED.

POINT TWO

ON OR ABOUT NOVEMBER 21, 2016 APPELLANT FILED A MOTION WITH THE APPELLATE DIVISION SECOND DEPARTMENT CITING AMONG OTHER ISSUES JUDICIARY LAW § 290, 292, 295, (PEOPLE V SCHALNUCK 286 NY 161) "THAT THE STATE MUST PROVIDE AN INDIGENT DEFENDANT WITH A TRANSCRIPT OF PRIOR PROCEEDINGS WHEN THAT TRANSCRIPT IS NEEDED FOR AN EFFECTIVE DEFENCE OR APPEAL" (UNITED STATES V YOUNG 472 F.2D 628, CITING BRETT V NORTH CAROLINA 404 U.S. 226). APPELLANT ARGUED THE COURT'S FAILURE TO PROVIDE HIM WITH THE SUPPRESSION HEARING MINUTES ALLEGEDLY CONDUCTED ON JANUARY 4, 2014 OR JANUARY 14, 2014. CITING PEOPLE V HANNIGAN 197 NY 820 152, "WHEREAS HERE, THERE ARE NO MINUTE

COURT DOCUMENTS OR OTHER INCONTROVERTIBLE EVIDENCE PRESENTED TO REBUT THE CLAIM OF THE PETITIONER, THE PETITION MAY NOT BE DESMISSED WITHOUT A HEARING" (PEOPLE V BARTLAM 9 NY2D 550, PEOPLE V LUPO, FAX 13 NY2D 253). SO THE COURT APPARENTLY TOOK THAT TO BE THE FACT PARTICULARLY (196 NE2D 58) SINCE THE TRIAL MINUTES DID NOT SHOW DEFENDANT'S THERE AT THE TIME.

ON JANUARY 13, 2017 THE APPELLATE DIVISION SECOND DEPARTMENT GRANTED APPELLANT MOTION TO FILE THE SUPPLEMENTAL BRIEF AND ORDERED THE COURT TO TURN OVER THE TRANSCRIPTS OF THE PROCEEDINGS CITED IN MY MOTION IF ANY EXISTED. FOR THE SAKE OF BREVITY I WILL OMIT LEGAL ARGUMENT AND CASE CITINGS (SEE APPELLANT'S PROSE MOTION). APPELLANT REQUESTED TRANSCRIPTS FROM THE PROCEEDINGS IN TAP-A JUDGE KRON FOR 30.20 AND SIX AMENDMENT PURPOSES, NINE HUNDRED AND EIGHTY SIX DAYS ELAPSED BETWEEN APPELLANT'S ARREST

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ON JULY 3, 2012 AND MARCH 4, 2015
APPELLANT'S CONVICTION AT TRIAL APPELLANT
DURING THE PRETRIAL CONFERENCE WAS NOT
ALLOWED TO SUBMIT MOTIONS, (NOTE
APPELLANT WAS REPRESENTING HIMSELF
PRO SE ALREADY GRANTED BY JUDGE KRON IN
TAP-A). TOO APPELLANT SUBMITTED A, C.P., L
330.30 MOTION WHICH WAS DENIED BY
JUDGE SCHWARTZ. ALSO APPELLANT IN HIS
MOTION TO THE APPELLATE DIVISION ARGUED
INEFFECTIVE ASSISTANCE OF APPELLANT
COUNSEL FOR SUBMITTING HIS MOTION
WITHOUT HAVING REVIEWED ALL THE
MINUTES AND FAILURE TO RAISE CONSTITUTIONAL
ISSUES, RIGHT TO BE PRESENT, RIGHT
TO PRESENCE OF COUNSEL, CONFRONTATION
ETCETRA. DESPITE THE APPELLATE COURT'S
DECISION / ORDER THE COURT HAS NOT
COMPLIED WITH PROVIDING APPELLANT
THE ABOVE TRANSCRIPTS AS CITED IN
HIS MOTION THEREBY PREJUDGING THIS
APPEAL.

THE INDICTMENT AND CONVICTION
SHOULD BE DISMISSED ENTIRELY.

POINT THREE

LINDA POYMAN ATTORNEY FOR APPELLANT SUBMITTED AN OMNIBUS MOTION DATED OCTOBER 12, 2012, TO PART TAP A FOR JUDGE CAMACHO, WHO RETURNED A DECISION/ ORDER DATED DECEMBER 19, 2012 GRANTING APPELLANT'S MOTION TO THE MAPP, HUNTLEY, WADE, DONAWAY HEARINGS. JUDGE HOLLES WHO CONDUCTED THE SUPPRESSION HEARING TERMINATED THOSE HEARINGS WITHOUT GIVING A RULING ON THE HUNTLEY/MAPP PORTION. HOWEVER IN APPELLANT'S MOVING PAPERS TO SUPPRESS IDENTIFICATION TESTIMONY ARGUED THAT UPON INFORMATION AND BELIEF THE DEFENDANT WAS IDENTIFIED IN A ONE ON ONE SHOWUP IDENTIFICATION CONDUCTED ON JULY 3, 2012 AT ABOUT 9:10 P.M. IN VICINITY OF NORTHERN BOULEVARD AND 105 STREET IN THE COUNTY OF QUEENS, CPL TIO. BO NOTICE AND THE DEMAND FOR A BILL OF PARTICULARS REQUESTING #7. WERE ANY DESCRIPTIONS OF THE PERPETRATOR OF THE ALLEGED CRIMES GIVEN TO THE POLICE OR ANY LAW ENFORCEMENT AGENCY ON OR AFTER THE DATE OF THE ALLEGED CRIME

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#10 PROVIDED COUNSEL IN THE MANNER WITH WHICH THE DEFENDANT WAS IDENTIFIED AS THE PERPETRATOR OF THE CRIMES ALLEGED C.R.L. 200.95 (6). IN THE PEOPLE'S RESPONSE TO DEFENDANT'S OMNEBUS MOTION PAGE 87 STATES: UPON INFORMATION AND BELIEF, THE SOURCE BEING, POLICE OFFICER PAMPENA THE DEFENDANT WAS IDENTIFIED BY THE COMPLAINANT IN A SHOWUP ON JULY 3, 2012 AT NORTHERN BOULEVARD AND 105 STREET. THIS PROCEDURE WAS CONDUCTED FAIRLY AND IN A NON-SUGGESTIVE MANNER, THE PROPERITY OF THE POLICE CONDUCT IN CONNECTION WITH THE IDENTIFICATION PROCEDURE USED IN THIS CASE CAN BE AMPLY DEMONSTRATED.

THE PEOPLE HEREWITH CONSENT TO A WADE HEARING UNDER CONSTRAINT OF SECTION 710.60 OF THE CRIMINAL PROCEDURE LAW, THE PEOPLE SHOULD HAVE GIVEN NOTICE TO DEFENDANT THAT THE ALLEGED FACTS SHOWING THE IDENTIFICATION THEY INTENDED TO USE AT TRIAL WAS NOT THE SORT THAT REQUIRES A WADE PRIOR IDENTIFICATION HEARING (U.S. V. WADE 388 U.S. 218). PARTICULARLY THAT E/TURK CLAIMED TO KNOW APPELLANT VERY WELL (TRD 384-385). BUT BASED ON A SHOWUP IDENTIFICATION DURING A WADE HEARING THAT WAS NEVER CONCLUDED (BA 36-BA 52). WHERE AT TRIAL E/TURKEY TESTIFIED

THAT THE ALLEGE SHOWUP DESCRIBED BY P.O. PAMPENA NEVER TOOK PLACE INSIDE EMS TRUCK (TRI 384) AND TWICE STATED THAT THIS BLACK GAY HOMELESS MAN HE SAW HUNDREDS OF TIMES OVER THE COURSE OF MONTHS WAS NOT PRESENT IN THE COURT ROOM (TRI 371 - TRI 385). IF THE WITNESS IS UNABLE TO IDENTIFY THE DEFENDANT AT TRIAL THE DEFENDANT'S CONVICTION (440 NYS2D 907) SHOULD NOT REST SOLELY UPON EVIDENCE OF A PRETRIAL IDENTIFICATION MADE UNDER CIRCUMSTANCES WHICH WERE LIKELY TO PRODUCE AN UNRELIABLE RESULT (PEOPLE V TROWBRIDGE 305 NY 471). THE JUNG HING RULE PRECLUDED TESTIMONY OF A PREVIOUSLY MADE IDENTIFICATION WHETHER IT WAS TENDERED BY THE PERSON WHO HAD MADE THE IDENTIFICATION OR BY ONE WHO WAS A WITNESS TO IT (PEOPLE V RAGAZENSKY 195 AD 743). WHILE GREAT WEIGHT MUST BE ACCORDED THE FINDINGS OF THE HEARING COURT (PEOPLE V PROCHLO 41 NY2D 759) A REVIEWING COURT SHOULD NOT "DISCARD COMMON SENSE AND COMMON KNOWLEDGE" (PEOPLE V GARAFALO 44 AD2D 86, PEOPLE V LEWIS 600 NYS2D 272). THE TESTIMONY GIVEN BY P.O. PAMPENA IS A CLASSIC EXAMPLE OF THAT WHICH HAS BEEN PATENTLY TAILORED TO NULLIFY CONSTITUTIONAL OBJECTIVES (PEOPLE V MANNING

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381 NYS2D 254). THROUGHOUT THE WHOLE
TIME THE APPELLANT HAS MAINTAINED HIS
INNOCENTS AND THAT P.D. PAMPENA'S STORY
OF THE EVENTS WERE FABRICATED (S21).

IN THE INTREST OF JUSTICE
THE INDECTMENT AND CONVICCEON
SHOULD BE DESMESSED.

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

People of the State of New York,

Respondent,

AFFIDAVIT OF SERVICE

v.

App. Div. Docket No. 2015-01907

Queens County Ind. No. 2228/12

Raymond Ball,

Appellant.

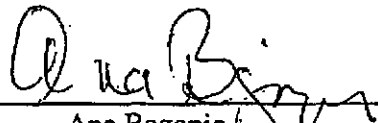
STATE OF NEW YORK)
COUNTY OF KINGS)ss:

Ana Begonja, being duly sworn, deposes and says:


1. I am not a party to the above-entitled proceeding. I am over 18 years of age. I reside in Whitestone, New York.

2. On April 27, 2017, I served a true copy of the appellant's pro se supplemental brief, via interoffice messenger, to the following person(s):

Richard A. Brown
District Attorney, Queens County
125-01 Queens Boulevard
Kew Gardens, N.Y. 11415


Ana Begonja

Sworn to before me this
27th day of April, 2017.



KRISTEN BARCELLONA
Notary Public, State of New York
No. 01BA6183514
Qualified in Nassau County
Commission Expires 03/17/2020

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To be argued by
JOSEPH Z. AMSEL
(TIME REQUESTED: 15 MINUTES)

New York Supreme Court

Appellate Division--Second Department

AD No. 2015-01907

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

RAYMOND BALL,

Defendant-Appellant.

SUPPLEMENTAL BRIEF FOR RESPONDENT

RICHARD A. BROWN
District Attorney
Queens County
Attorney for Respondent
125-01 Queens Boulevard
Kew Gardens, New York 11415
(718) 286-6649

JOHN M. CASTELLANO
JOHNNETTE TRAILL
JOSEPH N. FERDENZI
JOSEPH Z. AMSEL
Assistant District Attorneys
Of Counsel

JUNE 27, 2017

Queens County
Indictment Number 2228/2012

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SUPREME COURT OF THE STATE OF NEW YORK
 APPELLATE DIVISION: SECOND DEPARTMENT

----- X

THE PEOPLE OF THE STATE OF NEW YORK, :

Respondent, :

-against- :

RAYMOND BALL, :

Defendant-Appellant. :

----- X

SUPPLEMENTAL BRIEF FOR RESPONDENT

PRELIMINARY STATEMENT

By order dated January 13, 2017, the Court granted defendant's application to file a *pro se* supplemental brief. Respondent submits this brief in response to defendant's supplemental brief served on April 27th, 2017.

INTRODUCTION¹

In his *pro se* supplemental brief, defendant raises four meritless and unpreserved claims. First, defendant claims that the evidence presented at the suppression hearing, specifically the testimony of Police Officer Pampera, was incredible, as a matter of law, to meet the People's burden of

¹A summary of the trial evidence appears in Respondent's main brief. To the extent necessary, any additional facts are summarized below.

going forward. Defendant further contends that the People proffered Officer Pampena's testimony knowing that it was perjured. However, this claim lacks merit for the reasons set forth more fully in Point One of Respondent's main brief. The evidence was more than sufficient to establish the propriety of the police conduct at issue at the hearing and, under well-established caselaw, the hearing court's findings should be given great deference on appeal.

Second, defendant claims that the People committed a *Rosario* violation when they failed to disclose the "aided report." This claim too is meritless and contrary to the record because the record clearly establishes that this document does not exist. Moreover, defendant articulates no factual basis for his claim that the report does exist and that the People improperly denied its existence. Accordingly, because the People's representation to the court that the aided report does not exist is sufficient to defeat defendant's bare assertion that it does, both the hearing and trial courts correctly declined to issue any sanction for this non-existent *Rosario* violation.

Third, defendant claims that his confrontation right and constitutional and statutory right to be present at all points of the proceedings were violated when the hearing court concluded the reopened suppression hearing without defendant being present. This claim is meritless because,

contrary to defendant's suggestion, the record establishes that the date on which the reopened suppression hearing was concluded was a non-material, ancillary proceeding to which defendant could not have meaningfully contributed and thus his right to be present at a material proceeding was not violated.

Fourth, defendant claims that the court improperly denied his *pro se* speedy trial motion, assigned appellate counsel is ineffective for failing to raise the issues defendant raises herein, and that the Supreme Court failed to comply with this Court's order to provide the trial and hearing transcripts to defendant in order to prepare his *pro se* brief. These claims too are meritless. First, defendant raises no issue of law or fact with the court's denial of his *pro se* speedy trial motion and his claim that he did not have all the transcripts of every adjournment in this case are de hors the record. Moreover, defendant had enough information to file a *pro se* speedy trial motion below and he provides no reason why his lack of every record of every adjourn date limited his ability to point out any factual or legal error with the court's disposition of this motion. Second, defendant's claim that current appellate counsel is ineffective for failing to raise a speedy trial issue in this appeal or the various issues defendant raises herein is unfounded because the record does not establish that

counsel is either deficient or that defendant suffered any prejudice, and, in any event, this claim is premature insomuch as his appeal has yet to be decided.

In sum, all issues raised in defendant's *pro se* supplemental brief are meritless. For the reasons set forth below and in the People's main brief, defendant's conviction and sentence should be affirmed.

POINT ONE

THE HEARING COURT PROPERLY DENIED DEFENDANT'S MOTION TO SUPPRESS PHYSICAL EVIDENCE, STATEMENTS, AND IDENTIFICATION EVIDENCE AND DEFENDANT'S CLAIM THAT THE PEOPLE'S EVIDENCE WAS INCREDIBLE IS CONTRARY TO THE RECORD AND MERITLESS.

The People hereby rely on the arguments set forth in Point One of their main brief. Nonetheless, defendant claims, throughout his *pro se* supplemental brief, that the suppression hearing testimony was incredible and that, therefore, the People failed to establish that the police conduct was reasonable. Defendant is wrong. As noted in the People's main brief, great deference must be given to the hearing court that had the unique opportunity to see and hear the witnesses (*See* Respondent's Brief at 25 citing cases). Furthermore, defendant fails to identify as single reason for why the evidence

was incredible but simply asserts that it is. Accordingly, defendant's claim lacks merit and the hearing court's ruling should be affirmed in its entirety.

POINT TWO

**THE COURT CORRECTLY DECLINED TO
ISSUE A *ROSARIO* SANCTION BASED ON
THE PEOPLE'S REPRESENTATION AND
THE OFFICER'S TESTIMONY THAT NO
AIDED REPORT EXISTED AND DEFENDANT
HAS FAILED TO ARTICULATE A FACTUAL
BASIS FOR THE CLAIM THAT SUCH
DOCUMENT EXISTED.**

Defendant claims that the trial court erred in not imposing a *Rosario* sanction on the People for failing to disclose the aided report allegedly prepared by Police Officer Pampena (Defendant's *Pro Se* Supplemental Brief at 38-39). Defendant's claim is meritless. The record clearly establishes, and the People consistently maintained, that no aided report existed in this case and defendant has articulated no factual basis for his claim that such document existed. Accordingly, the court correctly denied defendant's application for sanctions against the People.

Under section 240.44(1) of the Criminal Procedure Law, at the conclusion of direct examination of a witness at a hearing, the People are required to disclose to the defendant any "written or recorded statement . . . made by such witness other than the defendant which relates to the subject

matter of the witness's testimony." *See also, People v. Rosario*, 9 N.Y.2d 286, 289 (1961). Under section 240.45(1), the same rules applies in the context of a trial, although the timing of the disclosure is before opening statements at a jury trial or before the submission of evidence begins in a bench trial. Generally, the prosecutor's statements, as an officer of the court, that no *Rosario* material exists is sufficient to establish that fact. *People v. Poole*, 48 N.Y.2d 144, 149 (1979); *People v. Shaw*, 244 A.D.2d 582, 582 (2d Dept. 1997). However, where the defendant can articulate a factual basis for the assertion that a prosecutor is improperly denying the existence of prior statements or where the prosecutor admits the existence of such statements but contends that they are irrelevant to the testimony of the witness, the court is required to conduct an *in camera* review to determine whether such statements are discloseable. *Id*; *see also, People v. Caballero*, 137 A.D.3d 929, 930 (2d Dept. 2016), *leave to appeal denied*, 28 N.Y.3d 927, *reconsideration denied*, 28 N.Y.3d 1071 (2016).

Even where a defendant has established that the People have failed to disclose *Rosario* material, a defendant must show prejudice. That is, that there is a "reasonable possibility that the non-disclosure materially contributed to the result of the trial or other proceeding." C.P.L. § 240.75.

Nonwillful or negligent loss or destruction of *Rosario* material does not mandate a sanction unless the defendant establishes prejudice. *People v. Martinez*, 22 N.Y.3d 551, 567 (2014). Upon making such a showing, the choice of an appropriate sanction is within the sound discretion of the court. *Id.* Sanctions may include granting the defendant an adjournment to investigate, study, or otherwise prepare for the consequence of the late disclosure, giving an adverse inference to the finder of fact that allows it to infer that the non-disclosed material contains statements that are contrary to what the witness testified to, issuing a protective order, precluding the “introduction of certain evidence or the calling of certain witnesses,” or taking “any other appropriate action,” which may even include dismissal in rare cases. *See* C.P.L. § 240.70; *see also, People v. Kelly*, 62 N.Y.2d 516, 522 (1984). However, preclusion of evidence and dismissal are “severe” sanctions that are “not to be employed unless any potential prejudice arising from the failure to disclose cannot be cured by a lesser sanction.” *People v. Jenkins*, 98 N.Y.2d 280, 284 (2002).

Here, the record clearly establishes that the People affirmatively represented that no aided report existed and defendant has failed to articulate a factual basis for the assertion that the People improperly denied its existence.

At the reopened hearing on January 8th, 2014, Officer Pampena testified that he had filled out an aided report in connection with defendant's arrest (H2²: 36-37). Defense counsel immediately informed the court that she had not received this document from the People and requested that the court direct the People to disclose it. Officer Pampena then immediately clarified that he had no specific recollection of filling out such a report but that it was his practice to do so in cases such as this (H2: 37-38).

At the conclusion of the hearing, the court ordered the officer and the People to conduct a diligent search of police records to locate the aided report, should it exist. The court informed the parties that it would delay making a decision on the reopened hearing until the People reported on the result of the officer's search. The court adjourned the case to January 14th, 2014, for this purpose. (H2: 50-52).

On January 14, 2014, the parties appeared before the court. Although defendant was produced, his presence in the courtroom was waived by his attorney (H3: 3). The People represented to the court that following Officer Pampena's testimony on January 8th, he returned to his police precinct

²A number preceded by "H2" refers to the page number of the record of the reopened suppression hearing conducted on January 8, 2014; "H3" refers to the record of January 14, 2014; and "T" refers to the record of the trial..

and searched for the aided report but to no avail. The People further informed the court that after conducting this search, the officer concluded that, as he had suggested during his testimony, he had not prepared an aided report in this case. The court asked the People whether they were satisfied with the officer's representation regarding his search, to which the People responded they were. The court accepted the People's representation that no aided report existed and concluded that, because it did not exist, there was no need for further cross-examination. The court then informed the parties that it would be denying suppression – as it had done before the hearing was reopened – and it would issue a written decision the same day (H3: 2-3). In a decision and order dated January 14th, 2014, the court denied suppression (Decision and Order Dated January 14, 2014).

Before Officer Pampena testified at trial, defendant, who was *pro se* at that point, moved *in limine* to preclude the officer's testimony on the grounds that the People had failed to disclose the aided report (T: 488). The People responded that, as the officer testified at the reopened hearing, it was only his general practice to prepare one but that an aided report was never prepared in this case. The People further argued that the officer clearly had misspoken when he said, at first, that he had filled out an aided report because

the People had conducted an “exhaustive search” for the report and no report existed (T: 489).³ Relying on the People’s representation, the trial court denied defendant’s motion to preclude Officer Pampena’s testimony. Later, Officer Pampena specifically testified that he had not prepared an aided report in this case (T: 543).

It is clear from the record that no aided report existed. Therefore, contrary to defendant’s claim, there was no *Rosario* violation here and both the hearing and trial courts correctly declined to issue a sanction. Furthermore, defendant has not articulated now, or in the courts below, any factual basis for the assertion that the People improperly denied the existence of the aided report here.

Furthermore, even assuming *arguendo* that an aided report existed – which the People do not concede – defendant has failed to demonstrate the necessary prejudice. In order to succeed on this claim, defendant is required to demonstrate that there is a reasonable possibility that the non-disclosure of an aided report materially contributed to the result of the trial. *See* C.P.L. § 240.75. Defendant, however, has failed to offer any argument or evidence as

³The co-defendant also inquired of Officer Lanning on cross-examination whether he had filled out an aided report in this case, to which Officer Lanning responded that he had not (T: 461, 466-67).

to what would have possibly been on an aided report that would have materially impacted any of the People's witnesses. Indeed, given the overwhelming evidence of guilt that resulted in defendant's conviction, it is entirely doubtful that he could offer such argument or evidence. Accordingly, defendant's claim lacks merit and should be rejected by this Court.

POINT THREE

DEFENDANT WAIVED HIS PRESENCE AT THE CALENDAR CALL WHERE THE HEARING COURT CONCLUDED THE REOPENED HEARING WITHOUT FURTHER TESTIMONY AND, IN ANY EVENT, THAT WAS A NON-MATERIAL, ANCILLARY PROCEEDING AT WHICH DEFENDANT DID NOT HAVE A RIGHT TO BE PRESENT.

Next, defendant claims that his right to due process, confrontation, and statutory right to be present at a material proceeding were all violated when the hearing court concluded the reopened suppression hearing on January 14th, 2014, without his presence in court. Defendant points to the hearing court's decision and order dated January 14th, 2014, which states that "on 1/4/14 the re-opened hearing was concluded and the defendant's motion to suppress . . . is again denied" (*See Decision and Order Dated January 14, 2014*, at 1). Defendant claims, without any record basis, that on January 4th, 2014, he

was not produced or present before the court. Defendant further claims that on January 14th, 2014 – the date of the decision and order – he was produced by the department of corrections but never appeared in the courtroom for the conclusion of the hearing. Thus, he claims, his statutory and constitutional right to be present and to confront the witnesses against him were violated (*See Pro Se Supplemental Brief at 41*).

Defendant is wrong for several reasons. First, contrary to defendant's claim, the record clearly establishes that the hearing court made a typographical error when it wrote that "1/4/14" was the date that it concluded the reopened hearing and that it really meant to write 1/14/14 – the same date of the decision and order. Second, the record also clearly establishes that defendant's attorney waived his appearance on January 14th, 2014. Finally, under well-established caselaw, defendant did not have a right to be present in court on January 14th, 2014 because this was a non-material, ancillary proceeding relating solely to a question of law upon which defendant could not have any meaningful input. Accordingly, defendant's claims are meritless and should be rejected by this Court.

As an initial matter, defendant is correct that he was not produced before the court on January 4th, 2014 because, based on records of the Queens

County Supreme Court (of which this Court can take judicial notice), defendant's case was not heard on January 4th, 2014. That this was so could also be gleaned from the fact that at the reopened hearing on January 8th, 2014, the court took testimony from two witnesses and at no point did the court or the attorneys (for the People, defendant, or co-defendant) make any reference to a proceeding on January 4th. Furthermore, as set forth above in Point Two, at the conclusion of the reopened hearing, after the question of whether the aided report existed was raised, the court adjourned the case to January 14th for "control" to give the People an opportunity to search for this alleged document (H2: 50-52). And on this date, after the People represented to the court that no aided report existed, the court concluded the hearing without taking any further testimony (H3: 2-3). Thus, it is clear from the record that no proceedings took place on January 4th and that when the court wrote that it concluded the hearing on "1/4/14" in its decision and order dated January 14th, it clearly meant to write 1/14/14, the same date of the decision and order.

With respect to defendant's claim that he had a right to be present on January 14th, this too is meritless. The record for January 14th, 2014 clearly establishes that on this date, defendant was produced by the department of corrections and present in the courthouse but was not brought before the court.

However, defense counsel specifically waived defendant's appearance (H3: 3). Thus, despite defendant's claim, his appearance was waived on this date and defendant cannot now be heard to complain that the court erred in not having him brought before it. Moreover, defendant tacitly accepted this waiver because at no point, especially once he was proceeding *pro se*, did he raise this issue, despite the probability of him having a copy of the hearing court's decision and order dated January 14th, 2014.⁴

Furthermore, even assuming *arguendo* that the waiver was somehow invalid, defendant did not have a right to be present on January 14th because this was a non-material, ancillary proceeding at which the court was resolving a question of law. Under the Fourteenth Amendment's Due Process Clause of the Federal Constitution, a defendant has a right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure. *See Kentucky v. Stincer*, 482 U.S. 730, 745 (1987); *see also, Snyder v. Massachusetts*, 291 U.S. 97, 105–06 (1934) (The “defendant has the privilege under the Fourteenth Amendment to be present in his own person whenever his presence has a relation, reasonably

⁴Defendant's extensive involvement in his defense even before he decided to proceed *pro se*, (*see, e.g.*, H2: 37), suggests that he had a copy of the decision well before this case proceeded to trial and certainly at trial, when he had ample opportunity to raise the claim he raises now.

substantial, to the fullness of his opportunity to defend against the charge.”). In New York, section 260.20 of the Criminal Procedure Law provides that a defendant has a right to be present “during the trial of an indictment.” C.P.L. § 260.20. The term “trial” has been expansively construed to include every “material stage of the trial” as well as “ancillary proceedings” at which a defendant’s presence could have a substantial effect on his or her ability to defend against the charges. *See People v. Roman*, 88 N.Y.2d 18, 25–26 (1996). However, a defendant does not have a right to present where such “presence could not have afforded him or her any meaningful opportunity to affect the outcome.” *Id.* at 26.

For example, calendar calls and proceedings at which questions of law are resolved and where, accordingly, there is no potential of any meaningful input from the defendant are not “material.” *See People v. DePallo*, 96 N.Y.2d 437, 443 (2001) (defendant does not have a right to be present during conference in chambers where defense counsel disclosed to the court defendant’s desire to offer perjurious testimony because there was “no potential for meaningful input” from the defendant); *People v. Morales*, 80 N.Y.2d 450, 457 (1992) (noting that a defendant has a right to be present during hearing where testimony is taken but does not have such a right when

issue before the court is a legal determination); *People v. Husbands*, 303 A.D.2d 227 (1st Dept. 2003) (proceeding at which court dealt with question of law not “material” because no potential for defendant to have meaningful input); *People v. England*, 19 A.D.3d 154, 155 (1st Dept. 2005) (“Defendant did not have a right to be present at the calendar call at which the court denied the motion, since the court was simply placing on the record the decision it had already made on defendant’s written submissions.”).

Here, the January 14th proceeding was non-material and ancillary and involved the court making a legal determination upon which defendant could not have any meaningful impact. As set forth more fully above in Point Two, the purpose of this proceeding was for the People to report to the court the result of the officer’s search for the alleged aided report. The court concluded that, based on the People’s representation, no further testimony in the hearing was required because the aided report did “not exist” (H3: 3). This was an entirely legal determination based upon the People’s representation upon which defendant’s presence would have had no impact.

Indeed, had court taken testimony on this date, for example, defendant’s presence would certainly have been necessary to aid his attorney in conducting cross-examination because certain facts needed to confront the

witnesses might be exclusively within defendant's knowledge. However, here, defendant's could not have meaningfully contributed to contradicting the People's representation about the existence of the alleged aided report, as is evident from the lack of a factual basis provided that the report actually existed, as discussed fully above in Point Two. Moreover, the determination that necessarily flowed from the court's finding that no aided report existed – that no further testimony was required – was a legal determination to which defendant, by virtue of his lack of legal training, could not have meaningfully contributed (*Cf.* Point Three of Respondent's Main Brief). Finally, defendant's speculative assertion that testimony was taken on January 14th is belied by the record of that proceeding.

In sum, defendant waived his appearance at the proceeding on January 14th. Furthermore, this proceeding was a non-material, ancillary proceeding at which defendant did not have a right to be present. Accordingly, defendant's meritless claim should be rejected by this Court.

POINT FOUR

**DEFENDANT'S REMAINING CONTENTIONS
ARE DEHORS THE RECORD AND, IN ANY
EVENT, ARE MERITLESS.**

Defendant further claims that the Supreme Court failed to comply

with this Court's order that the trial transcripts should be provided to defendant when it granted his motion to file a *pro se* supplemental brief (*Pro Se Supplemental* at 51). This claim is meritless because defendant does not point to which transcripts he lacks and while he asserts that his appeal is prejudiced, he does not explain how.

Also meritless is defendant's claim that the court improperly denied his *pro se* motion to dismiss on statutory and constitutional speedy trial grounds (*Pro Se Supplemental Brief* at 50-51). Defendant raises no issue of fact or law with regard to this decision and his claim that he could not now raise any such claims because he did not have the record of every adjournment in this case is similarly unpersuasive. After all, as defendant acknowledges, he previously filed a motion to dismiss on speedy trial grounds (*Pro Se Supplemental Brief* at 51). Thus, defendant clearly had enough information to make that motion and his failure to identify any error in the court's disposition of that motion renders his present claim meritless.

Similarly unpersuasive is defendant's claim that his appointed appellate counsel is ineffective for failing to raise a speedy trial issue and defendant's non-presence at the calendar call on January 14th, 2014 (*Pro Se Supplemental Brief* at 51). As discussed more fully above, these claim are

entirely meritless and thus appellate counsel's failure to raise this issue in defendant's main brief reflects an entirely reasonable strategy. *See People v. Baldi*, 54 N.Y.2d 137, 146 (1981); *People v. LaValle*, 97 N.Y.2d 721, 722 (2002). Moreover, the record is devoid of any evidence that defendant suffered any prejudice as a result of appellate counsel's failure to raise these issues – as he is required to show. *Id.*; *see also, Strickland v. Washington*, 466 U.S. 668, 688 (1984); *Smith v. Robbins*, 528 U.S. 259, 285 (2000). Furthermore, to now raise a claim that appellate counsel is ineffective is premature given that the appeal has yet to be decided and, in any event, defendant's ability to raise these issues in his *pro se* supplemental brief would enable this Court to cure any alleged prejudice. *See LaValle*, 97 N.Y.2d at 722.

Finally, defendant's claim that appellate counsel is ineffective for failing to review all the minutes in this case before filing defendant's main brief is *dehors* the record. Defendant has no record basis for this claim.

In sum, defendant's remaining contentions are meritless and are unsupported by the record. Accordingly, defendant's claims should be rejected by this court.

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CONCLUSION

For the reasons set forth above, defendant's judgment of conviction should be affirmed.

Respectfully submitted,

RICHARD A. BROWN
District Attorney
Queens County

JOHN M. CASTELLANO
JOHNNETTE TRAILL
JOSEPH N. FERDENZI
JOSEPH Z. AMSEL
Assistant District Attorneys
of Counsel

June 27, 2017

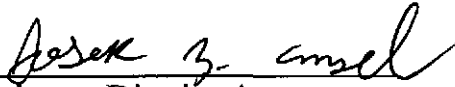
SR184

CERTIFICATE OF COMPLIANCE

I certify the following in compliance with section 670.10.3 of the Rules of this Court:

1. The foregoing brief was prepared on a computer.
2. The typeface used is Times New Roman.
3. The point size of the text is 14 point.
4. The brief is double spaced, except for the Table of Contents, point headings, footnotes, and block quotes.
5. The brief contains 4,110 words, exclusive of the Table of Contents, proof of service, and the certificate of compliance, based on the word count of the word-processing system used to prepare this brief.

Dated: Kew Gardens, New York
June 27, 2017


Assistant District Attorney

SR185

5-4

**Supreme Court of the State of New York
Appellate Division: Second Judicial Department**

D55532

G/hu

____AD3d____

Submitted - February 8, 2018

WILLIAM F. MASTRO, J.P.
REINALDO E. RIVERA
SYLVIA O. HINDS-RADIX
ANGELA G. IANNACCI, JJ.

2015-01907

DECISION & ORDER

The People, etc., respondent,
v Raymond Ball, appellant.

(Ind. No. 2228/12)

Randall D. Unger, Bayside, NY, for appellant, and appellant pro se.

Richard A. Brown, District Attorney, Kew Gardens, NY (John M. Castellano, Johnnette Traill, Roni C. Piplani, Meredith D'Angelo, Joseph N. Ferdenzi, and Joseph Z. Amsel of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Barry A. Schwartz, J.), rendered March 4, 2015, convicting him of robbery in the second degree (two counts), assault in the third degree, and criminal possession of stolen property in the fifth degree, upon a jury verdict, and imposing sentence. The appeal brings up for review the denial, after a hearing (Ronald D. Hollie, J.), of that branch of the defendant's omnibus motion which was to suppress physical evidence, identification testimony, and his statements to law enforcement officials.

ORDERED that the judgment is affirmed.

We agree with the hearing court's determinations that there was probable cause for the defendant's arrest, and accordingly, to deny suppression of physical evidence, identification testimony, and the defendant's statements to law enforcement officials (*see People v Mason*, 119 AD3d 710, 711; *People v Cotsifas*, 100 AD3d 1015, 1015; *People v McNeil*, 47 AD3d 647, 647; *People v Vasquez*, 291 AD2d 465, 465; *People v Jackson*, 282 AD2d 473, 474).

The defendant did not preserve for appellate review his argument that a proper

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foundation was not laid pursuant to CPL 60.25 to support the admission of testimony regarding the complainant's identification of the defendant at a pretrial showup (*see People v Davis*, 139 AD3d 966, 967; *People v Jenkins*, 205 AD2d 642, 643). In any event, that argument is without merit (*see People v Davis*, 139 AD3d at 967; *People v Rivera*, 308 AD2d 602, 603; *People v Polite*, 228 AD2d 705, 706; *People v Hernandez*, 154 AD2d 197, 202).


Contrary to the defendant's contention, the record, as a whole, demonstrates that the defendant's decision to waive his right to counsel and to proceed pro se was unequivocal, knowing, voluntary, and intelligent (*see People v Paulin*, 140 AD3d 985, 987; *People v Malone*, 119 AD3d 1352, 1354; *People v Lewis*, 114 AD3d 402, 404-405). The trial court's extensive inquiry established the defendant's ability to represent himself and emphasized the dangers and disadvantages of proceeding without counsel (*see People v McCord*, 133 AD3d 689, 690; *People v Zalevsky*, 82 AD3d 1136; *People v Damon*, 78 AD3d 860).

The sentence imposed was not excessive (*see People v Suitte*, 90 AD2d 80).

The defendant's remaining contentions, raised in his pro se supplemental brief, are without merit.

MASTRO, J.P., RIVERA, HINDS-RADIX and IANNACCI, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court

June 6, 2018

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Randall D. Unger
Attorney-at-Law

McGoldrick / Ferdenzi

42-40 Bell Boulevard, Suite 302 • Bayside, NY 11361

Tel: (718) 279-4500 • Fax: (718) 281-0850

June 10, 2018

Clerk of the Court of Appeals
20 Eagle Street
Albany, New York 12207

Re: People v. Raymond Ball
Application for Leave to Appeal

2228/12

Dear Sir/Madam:

I am counsel for Raymond Ball, the appellant in the above-referenced case. In a decision and order dated June 6, 2018, the Appellate Division, Second Department affirmed the judgment of the Supreme Court, Queens County, convicting Mr. Ball of robbery in the second degree and other related charges.

By this letter, I am requesting that this Court grant Mr. Ball leave to appeal from the decision entered below. Pursuant to that application, I am enclosing herein copies of the briefs submitted and the decision rendered in the court below. Kindly inform me when a judge is assigned to review the within application.

Very truly yours,

R. D. Unger

Randall D. Unger

cc: Hon. Richard A. Brown
District Attorney, Queens County
125-01 Queens Boulevard
Kew Gardens, New York 11415

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Grislo / Perdomo
2028/12

Randall D. Unger
Attorney-at-Law

42-40 Bell Boulevard, Suite 302 • Bayside, NY 11361

Tel: (718) 279-4500 • Fax: (718) 281-0850

July 16, 2018

Hon. Jenny Rivera
Judge of the Court of Appeals
Court of Appeals Hall
20 Eagle Street
Albany, New York 12207-1095

Re: People v. Raymond Ball
Application for Leave to Appeal

Dear Judge Rivera:

I am appellate counsel for Raymond Ball, the appellant herein. Mr. Ball was convicted in the Supreme Court, Queens County, of robbery in the second degree, assault in the third degree and criminal possession of stolen property in the fifth degree, following a jury trial. His conviction was affirmed in a decision and order issued by the Appellate Division, Second Department on June 6, 2018. Thereafter, I submitted to this Court copies of all of the briefs previously filed, as well as the decision and order of the Appellate Division. This letter is respectfully submitted in support of Mr. Ball's application for leave to appeal to this Court.

Contrary to the Appellate Division's determination, Mr. Ball's arrest was not supported by probable cause. For one thing, the description upon which the police acted when they confronted Mr. Ball was patently insufficient to establish reasonable cause to believe that he had committed the crime under investigation. The only descriptive information which the police possessed at that time was that the perpetrators were "male Blacks, wearing a white shirt, black pants". The police had no information as to the age, height or weight of the perpetrators, and no information regarding any distinctive facial features. Suffice it to say, descriptions such as those which the police possessed in this case have been found insufficient to establish reasonable suspicion. *People v. Hargroves*, 296 A.D.2d 581, 582 (2d Dept. 2002);

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People v. Riddick, 269 A.D.2d 471 (2d Dept. 2000). In light of that precedent, it cannot be concluded that the police had probable cause to arrest Mr. Ball, as the lower courts held.

Nor was probable cause established by Mr. Ball's possession of a cell phone, or the fact that he was running at the time of the police confrontation. Significantly, when the police approached Mr. Ball, they had no information as to the nature of the property that had alleged been stolen from the complaining witness. Thus, Mr. Ball's possession of a cell phone was essentially, innocuous and gave the police no greater authority than to question him. *People v. Howard*, 50 N.Y.2d 583, 590 (1980). And since Mr. Ball immediately complied with the officer's command to stop, and exhibited no furtive behavior in response to the officer's command, it cannot be concluded the degree of suspicion during his encounter with the police escalated to the point where it could be said that there was probable cause for his arrest. *People v. Benjamin*, 51 N.Y.2d 267 (1980).

In short, the police lacked probable cause to arrest Mr. Ball. His statements to the police, the cell phone recovered, and his subsequent identification in a showup procedure should therefore have been suppressed. And since without that evidence, the People would have been unable to establish a *prima facie* case against him, his conviction should be reversed and the indictment dismissed.

Mr. Ball's conviction should also be reversed based on the erroneous admission of third-party identification testimony from the arresting officer. At trial, the complaining witness did not identify Mr. Ball as one of the perpetrators, even though he asserted that he had seen him in the area on several occasions prior to the charged crime. Because the complaining witness did not identify Mr. Ball in the courtroom, the People invoked Section 60.25 of the Criminal Procedure Law to introduce testimony from the arresting officer that the complaining witness had identified Mr. Ball in a showup identification procedure. However, the People failed to lay a proper foundation for the introduction of such testimony. *People v. Patterson*, 93 N.Y.2d 80, 82 (1999).

A proper foundation for the admission of third-party identification testimony requires that the People satisfy three conditions: (1) that the witness

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observed the perpetrator during the charged offense; (2) that the witness subsequently identified the perpetrator whom he had observed, and (3) that the witness lacks present recollection to identify the defendant as the perpetrator. *Patterson*, at 82.

Here, while the People satisfied the first two conditions for introducing third-party identification testimony, they failed to satisfy the third condition: that the complaining witness could not make an in-court identification of Mr. Ball due to his failed recollection resulting from the passage of time. Because this condition was not satisfied, it cannot be concluded that the arresting officer's testimony regarding the complaining witness's showup identification was properly admitted under C.P.L. § 60.25. And since there was a significant probability that Mr. Ball would not have been convicted in the absence of such testimony, it cannot be concluded that the admission of this testimony was harmless. *People v. Crimmins*, 36 N.Y.2d 230.243 (1975). For this reason, the judgment of conviction must be reversed.

A further ground for reversing Mr. Ball's conviction was the trial court's decision to allow him to proceed *pro se* at his trial. A defendant's decision to waive his right to counsel in a criminal case must be knowing, voluntary and intelligent. *People v. Slaughter*, 78 N.Y.2d 485, 491 (1991). And to determine whether the waiver of such a fundamental right is truly effective, a trial court must undertake a "searching inquiry" of the defendant. *Faretta v. California*, 422 U.S. 806, 835 (1975). Moreover, in reaching the determination that a defendant's waiver of his right to counsel was effective, it must be established that the request to proceed *pro se* was unequivocal. *People v. Gillian*, 8 N.Y.3d 85, 88 (2006).

Here, Mr. Ball's request to proceed *pro se* was not unequivocal. The record reveals that prior to trial, Mr. Ball had repeatedly expressed dissatisfaction with his assigned attorney. And as the trial was about to begin, Mr. Ball informed the court that although he had not been threatened or coerced into proceeding *pro se*, he felt that he was in an "awkward position" and that he really didn't "have a choice in the matter".

While Mr. Ball's statements to the court certainly reflected a very sincere dissatisfaction with the manner in which his trial attorney had been representing him, they did not establish that his desire to proceed *pro se* was unequivocal. Moreover,

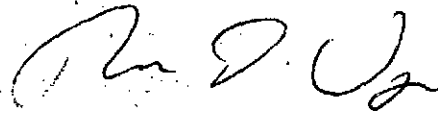
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since the record is devoid of evidence that the trial court fully informed Mr. Ball of the hardships he would experience in representing himself, or the fundamental rights he would be waiving by proceeding without counsel, it cannot be concluded that his decision to proceed *pro se* was made knowingly, intelligently and voluntarily. *People v. Mitchell*, 61 N.Y.2d 580, 585 (1984).

In sum, Mr. Ball was arrested without probable cause. His conviction was based, in large part, on improperly admitted third-party identification testimony. And his decision to proceed to trial *pro se* was not made knowingly, intelligently and voluntarily. For these reasons, as well as the reasons set forth in Mr. Ball's *pro se* supplemental brief, this Court should grant the instant application and permit an appeal from the decision of the Appellate Division, Second Department.

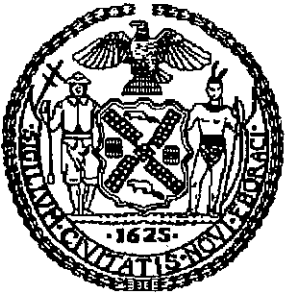
Respectfully submitted,



Randall D. Unger
Counsel for Defendant-Appellant
Raymond Ball

cc: Hon. Richard A. Brown
District Attorney, Queens County
125-01 Queens Boulevard
Kew Gardens, New York 11415

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DISTRICT ATTORNEY
QUEENS COUNTY
125-01 QUEENS BOULEVARD
KEW GARDENS, NEW YORK 11415-1568
(718) 286-6000

RICHARD A. BROWN
DISTRICT ATTORNEY

August 17, 2018

The Honorable Jenny Rivera
Judge of the Court of Appeals
Court of Appeals Hall
20 Eagle Street
Albany, New York 12207

Re: *People v. Raymond Ball*,
Queens County Ind. No. 222/12

Dear Justice Rivera:

This letter is filed in opposition to defendant's application for leave to appeal from an order of the Appellate Division, Second Department, dated June 6, 2018. By that order, the Appellate Division affirmed defendant's conviction of two counts of Robbery in the Second Degree (Penal Law § 160.10[2]), one count of Assault in the Third Degree (Penal Law § 120.00[1]), and one count of Criminal Possession of Stolen Property in the Fifth Degree (Penal Law § 155.35). The issues raised by defendant before the Appellate Division are meritless and involve questions of well-settled law that do not present novel issues of statewide significance.

First, defendant's challenge to the hearing court's finding that the police had probable cause to arrest defendant is a mixed question of law and fact and, thus, this Court can only review the issue to decide whether the lower court's determination is supported by the record. *See* C.P.L. § 450.90(2)(a); *People v. Shabazz*, 99 N.Y.2d 634 (2003); *People v. Valerio*, 95 N.Y.2d 924 (2000). Here, no further review is required because the decision is

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supported by the record. Indeed, the record supports the Appellate Division's finding "that there was probable cause for defendant's arrest. . ." *People v. Ball*, 162 A.D.3d 680 (2d Dept. 2018). As argued more fully in the People's Brief (Point One, 24-32), the hearing court properly held that there was probable cause to make an arrest where defendant was seen almost immediately after Officer Pampena received a radio run for a robbery in progress, defendant was observed less than two blocks from the robbery scene, and he was running away from that location and towards Officer Pampena's car. In addition, defendant matched the description given over the radio run, was holding an iPhone, which he spontaneously announced that he had bought from 105th Street and Northern Boulevard – exactly where the robbery had taken place just moments earlier – and where Mr. Elturkey identified defendant as one of the robbers and told Officer Pampena that money recovered on defendant was in the exact denominations that had been stolen from him. Accordingly, all of the above factual circumstances provided Officer Pampena with probable cause to arrest defendant. *See People v. Hollman*, 79 N.Y.2d 181, 184-85 (1992); *People v. DeBour*, 40 N.Y.2d at 223.

Second, defendant claims that this Court should review the argument that the People failed to lay a proper foundation for the admission of testimony regarding the complainant's identification of defendant at a show-up. Defendant, however, failed to preserve this claim for review as a matter of law. *People v. Ball*, 162 A.D.3d at 680; *see* C.P.L. § 470.05(2); *People v. Gray*, 86 N.Y.2d 10, 18 (1995). In his leave letter, defendant does not claim otherwise, and in fact, he fails to comply with the Court's rule that the appellant must identify and reproduce portions of the record where the issue is raised and preserved. *See* 22 N.Y.C.R.R. §500.20(a)(4). As such, this claim is unreviewable by this Court. In any event, as the Appellate Division further held, and as fully argued in the People's Brief (Point Two, 32-43), defendant's claim was without merit because the People laid the proper foundation to admit Officer Pampena's testimony about Mr. Elturkey's prior showup identification of defendant, as Mr. Elturkey testified that he had no recollection of the incident and had trouble remembering the co-defendant's face due to the passage of time. *People v. Nival*, 33 N.Y.2d 391, 395 (1974).

Third, the Appellate Division correctly found that the record demonstrated that defendant unequivocally, knowingly, voluntarily and intelligently waived his right to counsel and to proceed *pro se*. Indeed, here, defendant requested to represent himself on numerous occasions, in front of three different judges, and he did not request new counsel during his last two applications to represent himself, which were granted. And the decision to represent himself was not a spur of the moment decision on the eve of trial (Proceedings: 3-13). Far from that, defendant had requested to represent himself as far back as December 16, 2013, and his reasoning was that he had prepared his own legal defense and that he had represented himself at trial previously. Indeed, right before trial commenced, defendant responded, "that is correct" in response to the court's extensive questioning and warnings regarding self-

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representation at trial. Accordingly, the Appellate Division correctly noted that the trial court inquired extensively into defendant's ability to represent himself and emphasized the dangers and disadvantages of proceeding to trial without counsel. *People v. Ball*, 162 A.D.3d at 680.

Fourth, defendant's *pro se* claim that appellate counsel is ineffective for failing to review all the minutes in this case before filing defendant's main brief is de hors the record and must be raised in a coram nobis. As such, it is unreviewable on direct appeal. *See People v. Bachert*, 69 N.Y.2d 593 (1987).

Finally, as argued in the People's response to defendant's *pro se* supplemental brief before the Appellate Division, all of defendant's remaining *pro se* claims were meritless. Indeed, defendant's claim that Officer Pampena's testimony was incredible as a matter of law and that the People knowingly allowed Officer Pampena to perjure himself were entirely baseless and unsupported claims. Defendant's claim that the trial court failed to sanction the People for a *Rosario* violation because they failed to turnover an "aided report" was also baseless as the record clearly established that no such report was prepared in conjunction with the instant case, and thus sanctions were unwarranted. Defendant's claim that his due process rights to be present during every stage of the proceedings was violated when he was not present for a court appearance is similarly baseless, as the record indicated that the court's calendar call was non-material, ancillary to defendant's suppression hearing. *People v. Ball*, 162 A.D.3d at 680.

Consequently, defendant's claims present no novel issues of state-wide importance, are, in part, unpreserved, and are meritless. Therefore, defendant's application for leave should be denied.

Respectfully,



Tina Grillo
Assistant District Attorney
(718) 286-7091

cc: Randy Unger, Esq.
42-40 Bell Boulevard, Suite 302
Bayside, New York 11361

SR195

State of New York Court of Appeals

Jullo
Ferdery
2/28/12

BEFORE: HON. JENNY RIVERA, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

**ORDER
DENYING
LEAVE**

RAYMOND BALL,

Appellant.

Appellant having applied for leave to appeal to this Court pursuant to Criminal Procedure Law § 460.20 from an order in the above-captioned case;*

UPON the papers filed and due deliberation, it is

ORDERED that the application is denied.

Dated: September 13, 2018


Associate Judge

*Description of Order: Order of the Appellate Division, Second Department, entered June 6, 2018, affirming a judgment of the Supreme Court, Queens County, rendered March 4, 2015.